Supreme Court, U.S.
FILED
MAR 11 1994
OFFICE OF THE CLERK

NO. 93-1311

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT GEORGE BURCHILL,
Petitioner,

vs.

DOUGLAS KISH, et al.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

---

BRIEF IN OPPOSITION

HERBERT M. RAFNER
Counsel of Record
HOWARD S. STEVENS
Stevens & Johnson
740 Hamilton Mall
Allentown, PA 18101
(610) 439-1451
Counsel for Respondents,
Healtheast and
Allentown Hospital

RECEIVED
MAR 14 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

28 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Has a pro se plaintiff-attorney been denied due process where his action was dismissed conditionally, for failure of his complaint to state claims upon which relief can be granted, with leave to plead over, and he failed to file an amended complaint within the delimited time as extended on his motion, and the action was then dismissed with prejudice?

2. Was Petitioner denied due process because his petition for rehearing to the Circuit Court was denied after being submitted to the Judges who participated in the decision of the Court and other available Circuit Judges in regular active service, rather than to all of the Judges in regular active service?

TABLE OF CONTENTS

Counter-Statement of Questions Presented. i

Table of Authorities iii

Counter-Statement of the Case. . . 1

Summary of Argument. 6

Argument:

Petitioner Has Received Fair Play, Equivalent to due Process. 8

The Proceedings In The Circuit Court Did Not Deprive Petitioner of Due Process . . . 13

Conclusion 17

TABLE OF AUTHORITIES

Boddie v. Connecticut, 401 U.S. at 377, 28 L.Ed. 2d 113, 91 S.Ct. 780 (1971) 10

Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 41 L.Ed. 369, 17 S.Ct. 56. 13

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962). 10, 11

Hannah v. Larche, 363 U.S. 420, 4 L.Ed. 2d 1307, 80 S.Ct. 1502, (1960) reh. den., 364 U.S. 855, 5 L.Ed. 2d 79, 81 S.Ct. 33 8

James v. Appel, 192 U.S. 129, 48 L.Ed. 377, 24 S.Ct. 222 13

Little v. Streater, 452 U.S. 1, 68 L.Ed. 2d 627, 101 S.Ct. 2202 (1981) 9

Louisville & N.R. Co. v. Higdon, 234 U.S. 592, 58 L.Ed. 1484, 34 S.Ct. 948 13

Pittsburgh, C., C. & S. L. R. Co. v. Backus, 154 U.S. 421, 38 L.Ed. 1031, 14 S.Ct. 1114. 13

Shenker v. Baltimore and Ohio Railroad Company, 374 U.S. 1, 10 L.Ed. 2d 709, 713, 83 S.Ct. 1667 (1963). 15, 16

United States v. American Foreign Steamship Corporation, 363 U.S. 685, 4 L.Ed. 2d. 1491, 1494, 1495, 80 S.Ct. 1336, rehearing den. 364 U.S. 854 5 L.Ed. 2d 77, 81 S.Ct. 30, on remand (CA2 NY) 291 F.2d 598, cert. den. 368 U.S. 895, 7 L.Ed. 2d 92, 82 S.Ct. 171 and cert. den. 368 U.S. 895 7 L.Ed. 2d 92, 82 S. Ct. 172. 14

United States v. Heinze, 218 U.S. 532, 54 L.Ed. 1139, 31 S.Ct. 98. 13

Western PR Corp. v. Western PR Co., 345 U.S. 247, 97 L.Ed. 986, 73 S.Ct. 656 (1953) 15, 16

Statute

28 U.S.C. §46(C). 15

Texts

16A Am. Jur. 2d 1080 13

Rules

Local Rules of the United States District Court For The Eastern District of Pennsylvania Rule 20, Motion Practice 2, 3

F.R.C.P. Rule 5(e). 12

Statutes and Rules

28 U.S.C. §46(c):

Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with

section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.

Local Rules of The United States District Court For The Eastern District of Pennsylvania,

RULE 20. MOTION PRACTICE

(a) Every motion shall be accompanied by a form of order which, if approved by the court, would grant the relief sought by the motion. Every response in opposition to a motion shall be accompanied by a form of order, which, if approved by the court, will

deny or amend the relief sought by the motion.

(b) Every uncontested motion shall be accompanied by a certificate of counsel that such motion is uncontested.

(c) Every motion not certified as uncontested shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion. Unless the parties have agreed upon a different schedule and such agreement is set forth in the motion, or unless the court directs otherwise, any party opposing the motion shall serve a brief in opposition, together with such answer or other response as may be appropriate, within ten (10) days after service of the motion and supporting brief. (Note: pursuant to F.R.Civ.P. 6(e), an additional three (3) days shall be allowed if service is made by mail.) In

the absence of timely response, the motion may be treated as uncontested. The court may require or permit further briefing if appropriate.

(d) Every motion not certified as uncontested shall be accompanied by a written statement as to the date and manner of service of the motion and supporting brief.

(e) Within ten (10) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the Court Reporter Coordinator, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from obtaining a transcript, the post-trial motion must be dismissed for lack of prosecution.

(f) Any interested party may request oral argument on a motion. The

court may require oral argument, whether or not requested by a party. The court may dispose of a motion without oral argument.

(g) Motions for reconsideration or reargument shall be served within (10) days after the entry of the judgment, order, or decree concerned.

COUNTER-STATEMENT OF THE CASE

Petitioner Robert George Churchill, Esquire, filed a pro se complaint on May 13, 1992, against Respondents Allentown Hospital/Healtheast and fifteen other Respondents. The complaint alleged that these and the other Respondents violated Petitioner's civil rights during a May 13, 1990 arrest of Petitioner, a search of his home, and subsequent hospitalization at Allentown Hospital, he having been brought there by police because there was no bed available at the local state mental institution (Petition, p. 7).

The Petition is devoted to a recital of the reasons Petitioner feels aggrieved by the actions of the several Respondents, but omits a statement of the proceedings in the District Court which culminated in the dismissal of his case. It is those proceedings which are

most pertinent to the merits of the Petition, and are brought to the attention of this Honorable Court herein.

These Respondents filed a motion to dismiss on September 30, 1992. On Oct. 5, 1992, the District Court entered an order directing Petitioner to comply with Local Civil Rule 20 of the United States District Court for the Eastern District of Pennsylvania and file a proper response to Respondent's pending motion and another Respondent's motions. That order provided, "Plaintiff is hereby notified that if a proper response is not filed within twenty-one (21) days of the date of this order, the case will be dismissed by the Court with prejudice".

On November 9, 1992, on Petitioner's motion, the District Court extended the time for filing responses to the pending motions to dismiss and for summary judgment to November 23, 1992.

On December 8, 1992 the District Court entered an order which provided, "Plaintiff is specifically directed to comply with Local Rule Civil 20 of this Court and file proper responses to said motions . . . Plaintiff is hereby notified that if a proper response is not filed within twenty-one days of the date of this order, this case will be dismissed by the court with prejudice."

Motions to dismiss by other Respondents herein were filed. The District Court entered an order on January 5, 1993, again notifying the Petitioner that the case would be dismissed if proper responses to the pending motions were not filed within twenty-one days. On January 15, 1993, upon the Petitioner's further motion to enlarge time, the Court extended the time for compliance to February 5, 1993.

That order provided, "no further extensions will be permitted." Petitioner completed filing the required responses to the motions on or about February 11, 1993.

Respondents' motions to dismiss were granted by order dated February 22, 1993, but conditionally, without prejudice to Petitioner's right to plead over within twenty-one days of the date of the order. Petitioner having moved again to enlarge time, the District Court granted an order dated March 9, 1992 extending the time for the filing of Petitioner's amended complaint an additional twenty-one days. On April 5, 1993, the District Court, observing that no amended complaint was filed pursuant to the order of March 9, 1993, dismissed the case with prejudice. The amended

complaint was filed on April 8, 1993.[1]

On April 21, 1993, Petitioner filed a motion to obtain relief from judgment in the District Court and, on May 5, 1993, filed a notice of appeal to the Third Circuit Court of Appeals. The District Court dismissed Petitioner's April 21, 1993 motion on the ground that the Court was without jurisdiction at that time.

The Third Circuit affirmed the judgment of the District Court by order dated November 12, 1993, and denied Petitioner's motion for rehearing on December 16, 1993. The order sur petition for rehearing dated December 16, 1993 recited that the petition therefor had been submitted to the Judges who participated in the decision of the

---

1 The date that the amended complaint was mailed was disputed in the Court below. However, the docket shows that it was filed on April 8, 1993.

Court and the other available Circuit Judges in regular active service.

SUMMARY OF ARGUMENT

Due process in this case is that procedural process consistent with the rules of fair play which have been recognized through the years. There has been no violation of that standard herein. Petitioner has received more than a generous amount of fair play in this case. The order granting the several Respondents' motions to dismiss was not granted upon default, Petitioner having filed his responses thereto after his time for responding was extended several times upon his motions.

The order dismissing Petitioner's complaint for failure to state claims upon which relief can be granted was conditional, in that Petitioner was granted leave to plead over by a date

certain, which he failed to do after several extensions of the delimited time, when the dismissal was made final. That Petitioner was granted leave to plead over, coupled with the many extensions of filing dates he was granted, is convincing evidence that Petitioner was treated not only fairly, but generously.

Due process does not require rehearings. Petitioner was not denied due process merely because the order denying his Petition for Rehearing was submitted to the Judges who participated in the decision of the Court and the other available Circuit Judges of the Circuit in regular active service, rather than to all of the Judges in regular active service. Courts of Appeals may devise their own procedural rules.

ARGUMENT

Petitioner Has Received Fair Play, Equivalent to Due Process

The standard of due process applicable to the instant case is embodied in the rules of fair play which have become associated with various proceedings over the years. Hannah v. Larche, 363 U.S. 420, 4 L.Ed. 2d 1307, 80 S.Ct. 1502, (1960) reh. den., 364 U.S. 855, 5 L.Ed. 2d 79, 81 S.Ct. 33.

Petitioner moved the District Court for extensions of filing dates five times, and, each time, the Court granted those extensions, meanwhile issuing five orders, warning Petitioner to comply with a filing deadline, or the case would be dismissed. This sequence culminated in the grant of the dismissal motions on February 23, 1991 but with leave to serve an amended complaint within twenty-one days. The dismissal

motions were not granted upon Petitioner's default in responding thereto, but upon the merits, after consideration of Petitioner's opposing brief and affidavits.

The Court, on Petitioner's motion, extended the deadline for filing the amended complaint, and did not finally dismiss the action with prejudice until the Petitioner failed to file it on the due date, as extended. These extensions of numerous deadlines to a pro se attorney, can leave little doubt that Petitoner has been treated not only fairly, but generously, cf. Little v. Streater, 452 U.S. 1, 68 L.Ed. 2d 627, 101 S.Ct. 2202 (1981).

Petitioner was not snared by a concealed procedural deadfall. He ignored repeated warnings by the Court until, finally, his case was dismissed. There was no state action which deprived him

of an opportunity to be heard, cf. Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780 (1971).

Petitioner filed his motion to obtain relief from judgment on April 21, 1993, which was denied by the District Court on May 18, 1993, on the ground that it had no jurisdiction because Petitioner had filed a notice of appeal to the Third Circuit on May 5, 1993. Petitioner did not contest the grounds for that order in the Circuit Court.

In contradistinction to Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962), Petitioner did not lose in the Circuit Court on a mere technicality. The principal point he raised in his Third Circuit brief was that the denial of his motion for relief from judgment was an abuse of discretion. He did not raise any due process constitutional issue in that Court.

Petitioner had no need to move for leave to amend his complaint, unlike the petitioner in Foman, supra. To the contrary, leave to amend had been granted in the order which dismissed the case.

This case is strikingly different from Foman, supra., with respect to the application of the rules of fair play. Petitioner did not avail himself of the opportunity to timely file an amended complaint, despite the grant, upon his motion, of an extension of the filing date. Petitioner does not assert that there was an abuse of discretion in the form of the denial of any of his motions for extensions of time. There was no such denial. Respondents respectfully submit that there has been no abuse of judicial discretion sufficient to warrant review by this Honorable Court.

There was a dispute in the Court

below as to when Petitioner's amended complaint was served, but it cannot be disputed that it was filed two days after the order dismissing the case with prejudice was entered. F.R.C.P. Rule 5(e) defines filing with the court as filing with the clerk of court, except that the judge may permit the papers to be filed with the judge. Papers are not filed when they are mailed.

It was not a denial of due process by the Courts below to apply the plain meaning of Rule 5(e) by ruling, in effect, that Petitioner had failed to timely file his amended complaint, notwithstanding that it may have been mailed on the due date. Petitioner contended, in his motion to obtain relief from judgment, that he misconstrued the District Court's February 22, 1993 order conditionally dismissing the case as requiring mailing, rather

than filing, the amended complaint. Respondents respectfully submit that there is no due process right to misconstrue either Court orders or the Federal Rules of Civil Procedure.

The Proceedings In The Circuit Court Did Not Deprive Petitioner Of Due Process

"Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing before judgment, if ample, satisfies the demand of the of the Federal Constitution in this respect." 16A Am. Jur. 2d 1080.[2] The

[2] Citing, at footnote 82, Louisville & N.R. Co. v. Higdon, 234 U.S. 592, 58 L.Ed. 1484, 34 S.Ct. 948; United States v. Heinze, 218 U.S. 532, 54 L.Ed. 1139, 31 S.Ct. 98; James v. Appel, 192 U.S. 129, 48 L.Ed. 377, 24 S.Ct. 222; Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 41 L.Ed. 369, 17 S. Ct. 56; Pittsburgh, C., C. & S. L. R. Co. v. Backus, 154 U.S. 421, 38 L.Ed. 1031, 14 S.Ct. 1114.

principal purpose of in banc proceedings is to maintain the integrity of the decisions of the Court of Appeals by assuring that a majority of the judges always control its precedential decisions. The procedure to be followed by a Court of Appeals is left to determination by each Court. United States v. American Foreign Steamship Corporation, 363 U.S. 685, 4 L.Ed. 2d. 1491, 1494, 1495, 80 S.Ct. 1336, rehearing den. 364 U.S. 854 5 L.Ed. 2d 77, 81 S. Ct. 30, on remand (CA2 NY) 291 F.2d 598, cert. den. 368 U.S. 895, 7 L.Ed. 2d 92, 82 S.Ct. 171 and cert. den. 368 U.S. 895, 7 L.Ed. 2d 92, 82 S. Ct. 172.

The fact that Petitioner's petition for rehearing to the Third Circuit was submitted to the Judges who participated in the decision of the Court and the other available Circuit Judges of the Circuit in regular active service,

rather than to all of the Judges in regular active service, is neither irregular nor a deprivation of due process.

28 U.S.C. §46(c), which authorizes hearings and rehearings by the Circuit in banc, is addressed to the Courts of Appeals rather than to litigants; the Courts of Appeals have the power to establish their own procedures relative to the conduct of in banc proceedings, including the discretion to determine what cases to take in banc. Shenker v. Baltimore and Ohio Railroad Company, 374 U.S. 1, 10 L.Ed. 2d 709, 83 S.Ct. 1667 (1963). Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 97 L.Ed. 986, 73 S.Ct. 656 (1953); Mr. Chief Justice Warren expressed the opinion of a majority of the Court on this point as follows:

"The Court had occasion to consider

this section at length in Western Pacific R. Corp. v Western Pacific R. Co., 345 US 247, 97 L ed 986, 73 S Ct 656. It there said: 'In our view, §46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order [374 US 5] hearings en banc. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.' Id., at 250." Shenker v. Baltimore and Ohio Railroad Company, supra., 10 L ed 2d at p. 713.

There has been no abuse of

discretion amounting to a denial of due process in this case, either by the dismissal with prejudice by the District Court or by the proceedings in the Circuit Court. Petitioner, while appearing pro se, is himself an attorney. Therefore, this is not a case where a party suffered a detriment through an attorney's procedural error, nor a case where a pro se party with a worthy cause, but unschooled in the law, loses out because he or she is entrapped in a procedural morass. Petitioner, like every attorney and every litigant, is chargeable with the knowledge of proper procedure.

CONCLUSION

The Petition has shown no special or important reason for the grant of certiorari and it should, therefore, be denied.

Respectfully submitted,

STEVENS & JOHNSON

HERBERT M. RAFNER, ESQUIRE
Counsel of Record for
Respondents Healtheast
and Allentown Hospital
740 Hamilton Mall
Allentown, PA 18101
(610) 439-1451

HOWARD S. STEVENS, ESQUIRE
740 Hamilton Mall
Allentown, PA 18101
(610) 439-1451

No. 93-1311

(5)

Supreme Court, U.S.
FILED
MAR 15 1994
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT GEORGE BURCHILL,

Petitioner,

v.

DOUGLAS KISH, SCOTT R. REHRIG, MICHAEL HARBOVE, DONALD K. MACCONNELL, ARTHUR SPITKO, THOMAS TOTH, SOUTHWHITEHALL POLICE DEPARTMENT, SOUTHWHITEHALL TOWNSHIP, KELLY WALDRON, ROBERT L. STEINBERG, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, LEHIGH COUNTY, ALLENTOWN HOSPITAL/HEALTHEAST, DR. PAUL GROSS, CLYDE R. BOWER, JOHN DOE AND RICHARD DOE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, PAUL K. GROSS, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Barbara S. Magen, Esquire
Counsel of Record
Susan Ellis Wild, Esquire
POST & SCHELL, P.C.
1800 J.F.K. Boulevard
Philadelphia, PA 19103
(215) 587-1000

Attorneys for Respondent, Paul K. Gross, M.D.

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit correctly affirm the Order of the United States District Court for the Eastern District of Pennsylvania which properly dismissed petitioner's Complaint with prejudice due to petitioner's flagrant and perpetual failure to comply with numerous court Orders?

LIST OF THE PARTIES

The parties set forth in the caption are the only parties to this action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT – REASONS FOR DENYING PETITION	8
The Third Circuit was correct in affirming the Order of the District Court which properly dismissed petitioner's Complaint with prejudice due to his flagrant and perpetual failure to comply with numerous court Orders	8
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Burchill v. Kish, No. 93-1438, 1993 U.S. App. LEXIS 32794 (3d Cir. Nov. 12, 1993) 1

Costello v. United States, 81 S.Ct. 534 (1961) 11

De La Fuente v. Central Electric Cooperative, Inc., 703 F.2d 63 (3d Cir. 1983)..... 15

EF Operating Corporation v. American Buildings, 993 F.2d 1046 (3d Cir. 1993)..... 15

Guyer v. Beard, 907 F.2d 1424 (3d Cir. 1990) 6

Hewlett v. Davis, 844 F.2d 109 (3d Cir. 1988) 8, 9

Link v. Wabash Railroad Co., 82 S.Ct. 1386 (1962) 7, 8

Mindek v. Rigatti, 964 F.2d 1369 (3d Cir. 1992)..... 6, 9-11

National Hockey League v. Metropolitan Hockey Club, Inc., 96 S.Ct. 2778 (1975) 11

Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984)..... 9, 10

Thompson v. Housing Authority of the City of Los Angeles, 782 F.2d 829 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 112 (1986) 6

Welch v. Folsom, 925 F.2d 666 (3d Cir. 1991)..... 15

Statutes:

42 U.S.C.S. §1981 2

42 U.S.C.S. §1982 2

42 U.S.C.S. §1983 ..... 2, 9

42 U.S.C.S. §1985 2

42 U.S.C.S. §1988 2

TABLE OF AUTHORITIES – *(Continued)*

Rules: Page

E.D. Pa. Loc.Civ.R. 20 ..... 3, 4

Fed.R.Civ.P. 6 14

Fed.R.Civ.P. 41 ..... 6-9, 13

Fed.R.Civ.P. 59 ..... 14, 15

Fed.R.Civ.P. 60 14

Other Authorities:

5 *Moore's Federal Practice* §41.11 (1993) 8

Wright & Miller, 9 *Federal Practice and Procedure*: Civil §2369, §2370 (1971) 8

No. 93-1311

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROBERT GEORGE BURCHILL,

Petitioner,

v.

DOUGLAS KISH, SCOTT R. REHRIG, MICHAEL HARBOVE, DONALD K. MACCONNELL, ARTHUR SPITKO, THOMAS TOTH, SOUTHWHITEHALL POLICE DEPARTMENT, SOUTHWHITEHALL TOWNSHIP, KELLY WALDRON, ROBERT L. STEINBERG, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, LEHIGH COUNTY, ALLENTOWN HOSPITAL/HEALTHEAST, DR. PAUL GROSS, CLYDE R. BOWER, JOHN DOE AND RICHARD DOE,

Respondents.

BRIEF FOR RESPONDENT, PAUL K. GROSS, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision and Opinion of the United States Court of Appeals for the Third Circuit is reported at *Burchill v. Kish*, No. 93-1438, 1993 U.S. App. LEXIS 32794 (3d Cir. Nov. 12, 1993) and is included in the Appendix to the Petition for Writ of Certiorari. The Order and Opinion of the United States District Court for the Eastern District of Pennsylvania has not been reported.

JURISDICTION

The statement of the grounds upon which the jurisdiction of this Court is sought is correctly presented in the Petition for Writ of Certiorari.

STATUTES

A listing of the statutes upon which petitioner's Writ of Certiorari relies is presented in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This appeal stems from an action brought by petitioner, Robert George Burchill (hereinafter "petitioner" or "Mr. Burchill"), against the respondents, including respondent herein, Paul K. Gross, M.D. (hereinafter "respondent" or "Dr. Gross"), in the United States District Court for the Eastern District of Pennsylvania. Petitioner initiated his action, in the form of a *pro se* Complaint, wherein he alleges violations of his constitutional rights pursuant to 42 U.S.C.S. §1983 with additional references to 42 U.S.C.S. §1981, §1982, §1985 and §1988.

Petitioner's underlying action alleges a deprivation of his constitutional rights and includes numerous factual averments against a multitude of parties. The Complaint appears to claim causes of action which took place on May 13, 1990 and May 14, 1990. Petitioner avers that he was lawfully in his home when several police officers, who are co-respondents in this action, entered his residence at gunpoint. Mr. Burchill claims that the police officers illegally searched his home, hand-cuffed and shackled him, caused his personal injury and failed to apprise him of his legal rights during the search. The Complaint further alleges that the police officers were in contact with officials of the Southwhitehall Police Department and Lehigh County District Attorney's Office during the search. It is asserted that various items of petitioner's personal property were

illegally confiscated. Moreover, the Complaint alleges that one of the Lehigh County Assistant District Attorneys instructed or advised one of the police officers to have petitioner committed to a hospital for mental health treatment.

Significantly, there are no specific averments against Dr. Gross contained in the Complaint. There are only two mentions of Dr. Gross in the pleading. The first appears in Paragraph 15, where Mr. Burchill avers "that after Plaintiff was illegally committed to Defendant Allentown Hospital/Healtheast, he briefly saw Defendant Dr. Gross only on one occasion at approximately 7:30 A.M. on 5/14/90." The only other mention of Dr. Gross is contained in Paragraph 24(d), which is not actually an averment against Dr. Gross, but rather appears to be an averment against counsel who was appointed to represent petitioner and who allegedly misrepresented a planned evaluation by Dr. Gross.

By the very nature of petitioner's Complaint, it is clear that Dr. Gross saw Mr. Burchill on a single occasion; the Complaint contains absolutely no allegations as to any improper conduct by Dr. Gross at that time nor any other activity by Dr. Gross which operated to deprive petitioner of his constitutional rights. Accordingly, it is clear that Mr. Burchill failed to state any cause of action for which relief may be granted against Dr. Gross.

On September 30, 1992, co-respondent, Allentown Hospital/Healtheast, Inc. (hereinafter "Allentown Hospital"), filed a Motion to Dismiss petitioner's Complaint. On October 5, 1992, Dr. Gross also filed a Motion to Dismiss the petitioner's Complaint along with a Brief in support of that Motion.

Thereafter, on October 6, 1992, the Honorable Franklin S. Van Antwerpen executed an Order directing that Mr. Burchill comply with Local Civil Rule 20 of the Eastern District Court and file a response to the Motions filed by Allentown Hospital and Dr. Gross. Judge Van Antwerpen specifically ordered that if petitioner did not

file a response within twenty-one days, the case would be dismissed with prejudice. Accordingly, Mr. Burchill had to file his response no later than October 26, 1992.

Despite the court's October 6, 1992 Order, petitioner did not file a Motion nor any other document requesting an additional extension of time for purposes of responding to the Motions to Dismiss. Then, on or about November 1, 1992, petitioner mailed an Answer to the Motion to Dismiss of Dr. Gross. The mailing was untimely as it failed to comply with the deadlines established by Judge Van Antwerpen pursuant to the October 6, 1992 court Order. As a result, Dr. Gross filed a Motion to Strike petitioner's Answer to the Motion to Dismiss.

Around the same time, co-respondents, Kelly Waldron, Robert L. Steinberg, Lehigh County District Attorney's Office and Lehigh County, filed Motions to Dismiss and for Summary Judgment against petitioner. Mr. Burchill then filed a Motion to Enlarge Response Time and, on November 10, 1992, the District Court granted petitioner's request. Despite the court's Order, on or about December 3, 1993, petitioner filed untimely responses to the Motions.

On December 9, 1992, Judge Van Antwerpen executed an Order directing petitioner to comply with Local Civil Rule 20 of the District Court and to file proper responses to all of the Motions to Dismiss. The Order explained that such information was necessary to aid the court "in understanding the legal basis of plaintiff's claim." The Order stated that "PLAINTIFF IS HEREBY NOTIFIED THAT IF A PROPER RESPONSE IS NOT FILED WITHIN TWENTY-ONE (21) DAYS OF THE DATE OF THIS ORDER, THIS CASE WILL BE DISMISSED BY THE COURT WITH PREJUDICE."

Thereafter, on January 6, 1993, Judge Van Antwerpen entered a similar Order directing petitioner to "file a proper response" to a Motion to Dismiss filed by co-respondents, Douglas Kisk, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, Southwhitehall Police Department and

Southwhitehall Township. In response, petitioner filed another Motion to Enlarge Response Time and, on January 15, 1993, Judge Van Antwerpen extended the time for petitioner's response until February 5, 1993. That Order also stated that "NO FURTHER EXTENSIONS WILL BE PERMITTED." Despite the final deadline being established by the court, petitioner failed to file a response until February 11, 1993.

On February 22, 1993, the District Court wrote a seven page Order granting various Motions of respondents "without prejudice to [appellant's] right to plead over within twenty-one (21) days of the date of this Order." The Order stated that the court would "expect and direct that plaintiff shall and will drop all causes of action which are improper or which lack merit, and file a timely new proper pleading asserting any remaining causes of action within twenty-one (21) days of the date of this Order." Moreover, after reviewing various aspects of civil rights case law, the District Court issued a warning to petitioner and indicated that it would "impose substantial monetary or other sanctions for any causes of action in any Amended Complaint which are brought in bad faith."

On March 9, 1993, Judge Van Antwerpen, upon consideration of Mr. Burchill's Motion to Enlarge Response Time, directed that petitioner's Amended Complaint be filed "within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice." The court also wrote that no further extensions would be permitted. However, petitioner, in total disregard of that Order, failed to file a timely Amended Complaint and instead waited until April 8, 1993, well beyond the deadline, to comply with the District Court's directive.

Consequently, on April 5, 1993, Judge Van Antwerpen dismissed petitioner's case with prejudice as to all respondents, including Dr. Gross. That Order was entered on April 6, 1993. Subsequently, on April 21, 1993, Mr. Burchill filed a Motion to Obtain Relief from Judgment and, approximately two weeks later, on May 5,

1993, filed a Notice of Appeal to the United States District Court for the Eastern District of Pennsylvania from the Order dated April 5, 1993. Accordingly, on May 18, 1993, the District Court entered an Order which administratively dismissed petitioner's Motion to Obtain Relief since the Court was "without jurisdiction to enter it at this time." The appeal which was taken by Mr. Burchill to the United States Court of Appeals for the Third Circuit concerned only the District Court's April 4, 1993 Order dismissing petitioner's Complaint with prejudice.

Upon review, the United States Court of Appeals for the Third Circuit entered a Judgment Order, dated November 12, 1993, which directed that the Judgment of the District Court, which had been entered on April 6, 1993, be affirmed. Petitioner has now filed a Writ of Certiorari with this Court from the Third Circuit's decision.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied. The U.S. Court of Appeals for the Third Circuit followed the Federal Rules of Civil Procedure in dismissing petitioner's claim. Specifically, a dismissal under Fed.R. Civ.P. 41(b) for failure of a plaintiff to comply with an order of the court, whether on a defendant's motion or the court's own, is a matter resting "firmly within the discretion of the District Court judge." *Mindek v. Rigatti*, 964 F.2d 1369, 1372 (3d Cir. 1992). Moreover, a motion to dismiss, pursuant to Fed.R.Civ.P. 41(b), will be reversed on appeal only when there is a manifest abuse of discretion demonstrated by the complaining party. *Id.*, 964 F.2d at 1373, 1374; *see Guyer v. Beard*, 907 F.2d 1424 (3d Cir. 1990); *see also Thompson v. Housing Authority of the City of Los Angeles*, 782 F.2d 829 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 112 (1986).

Instantly, there was no abuse of discretion committed by either the Eastern District Court or the Third Circuit. As has been set forth in the Statement of the Case in this Brief, from the outset of this litigation, petitioner failed to comply with a litany of court Orders, including the February 22, 1993 Order which directed that petitioner must file an Amended Complaint within twenty-one days or else have his case dismissed with prejudice. Since the petitioner did not comply with any of the court Orders, his case was properly dismissed. It simply may not be said that the lower courts made a "snap judgment" nor may it be said that the Eastern District Court or the Third Circuit did not fully take into consideration the District Court's extended contact with the litigant.

Without question, a review of this matter reveals that the Third Circuit did not render a decision in conflict with any decision of any other United States Court of Appeals on the same matter nor did it depart from the accepted and usual course of judicial proceedings. *See Link v. Wabash Railroad Co.*, 82 S.Ct. 1386 (1962)(this Court holds that it was not an abuse of discretion for district court to have dismissed an action for failure to prosecute and affirms orders, pursuant to Fed.R.Civ.P. 41(b), of both the district court and the Seventh Circuit). Much to the contrary, the decision of the Third Circuit was in full accord with all legal authority and fully justifies denying petitioner's Writ of Certiorari.

ARGUMENT – REASONS FOR DENYING PETITION

The Third Circuit was correct in affirming the Order of the District Court which properly dismissed petitioner's Complaint with prejudice due to his flagrant and perpetual failure to comply with numerous court Orders

Fed.R.Civ.P. 41, addressing dismissal of actions, states, in pertinent part,:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed.R.Civ.P. 41(b).

Commentary addressing the above Rule clarifies that, under the precept, while a defendant may move for dismissal for want of prosecution, a district court may, in the exercise of its own inherent power to keep its dockets clear, dismiss a matter on its own motion for want of prosecution. 5 *Moore's Federal Practice* §41.11[2](1993)(footnotes omitted), *citing*, *Link v. Wabash Railroad Co.*, 82 S.Ct. 1386 (1962); *Hewlett v. Davis*, 844 F.2d 109 (3d Cir. 1988). An involuntary dismissal under Rule 41(b) amounts to an adjudication on the merits and is with prejudice to the bringing of a new action. Wright & Miller, 9 *Federal Practice and Procedure*: Civil §2369 (1971). It is apparent that allowing dismissal for failure to prosecute is "intended as a safeguard against delay in litigation and harassment of a defendant." *Id.* at §2370. Moreover, a decision based upon Rule 41(b) rests in the sole discretion of the district

court judge and is reviewable only for an abuse of discretion. *Hewlett*, 844 F.2d at 114.

Recently, the Third Circuit specifically addressed Rule 41(b) and affirmed the district court's dismissal of a plaintiffs' Complaint. In *Mindek v. Rigatti*, 964 F.2d 1369 (3d Cir. 1992), the court considered the case of two plaintiffs who, from the commencement of their lawsuit, flouted court orders and "denigrated the authority of the magistrate judge to whom their case was assigned." *Id.*, 964 F.2d at 1370. Specifically, the plaintiffs brought a lawsuit under 42 U.S.C.S. §1983 alleging that police officers used excessive force and performed an unconstitutional seizure of their tape recorder in conjunction with the enforcement of an allegedly unconstitutional anti-loitering ordinance. *Id.*, 964 F.2d at 1371. After plaintiffs failed to recognize the judge's authority by refusing to comply with court orders, the magistrate judge determined that dismissal was warranted pursuant to the Third Circuit's previous decision in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984).

On appeal in *Mindek*, the court affirmed the dismissal of plaintiffs' complaint with prejudice. In so doing, the court recognized that the decision to dismiss constitutes an exercise of the judge's discretion and "must be given great deference by this Court – a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted." *Id.*, 964 F.2d at 1373. The Third Circuit stated:

> To tolerate the delays caused by the Mindeks, or to equivocate over lesser sanctions, would make a mockery of the very objectives of the 'civil justice expense and delay reduction plans' which the district courts have developed and implemented pursuant to the Civil Justice Reform Act of 1990. 28 U.S.C. 472 *et. seq.* (supp.

> 1991). Congress enacted the Civil Justice Reform Act of 1990 after having found that unnecessary costs and delays in the federal judicial system had seriously decreased access to the courts. . . . The district court plans . . . are designed to proscribe delay and to reduce expense by encouraging early judicial intervention and efficient judicial management of litigation.
>
> * * *
>
> . . . [W]e in the Court of Appeals should not add to the burdens of the district courts by suffering the behavior of litigants who, like the Mindeks refused to abide by prescribed rules of court. The district courts cannot, and should not, tolerate unjustifiable delays and the expense of irreplaceable judicial resources caused by litigants, pro-se or represented, who will not obey court orders. Nor will we.

Mindek, 964 F.2d at 1374, 1375 (citations omitted).

As set forth above, in *Mindek*, the Third Circuit referred to its previous decision in *Poulis v. State Farm Fire & Casualty Company*, 747 F.2d 863 (3d Cir. 1984). In *Poulis*, after the plaintiffs failed to comply with court orders, the district court, *sua sponte*, dismissed the case with prejudice. *Id.*, 747 F.2d at 865. In affirming the judgment of the lower court, the Third Circuit provided factors, which were not meant to be mechanically applied, which may be used in determining whether a district court has abused its discretion in dismissing a case. As the *Mindek* court stated, "*Poulis* did not provide a magic formula whereby the decision to dismiss or not to dismiss a plaintiff's complaint becomes a mechanical calculation easily reviewed by this Court. . . . Instead, the decision must be made in the context of the district court's extended contact with the litigant." *Mindek*, 964 F.2d at 1373. Ultimately, in both cases, *Poulis* and *Mindek*, the Third Circuit determined that the district

court had not abused its discretion in dismissing plaintiffs' complaints due to the pattern of dilatory behavior and the refusal to comply with court orders.

Moreover, the Third Circuit, in *Mindek*, quoted from a decision of this Court, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 96 S.Ct. 2778 (1975), in offering additional insight into the discretion given to a district court judge when making a decision on whether to dismiss an action. This Court, in reversing a decision of the Third Circuit after the Circuit had reversed a district court judge's dismissal of an unmanageable plaintiff's complaint, stated:

> the question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.
>
> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. . . . But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League, 96 S.Ct. at 2780, 2781; *see also Costello v. United States*, 81 S.Ct. 534 (1961).

In conjunction with all of the foregoing legal authority, it is evident, in the instant case, that the District Court acted well within its discretionary authority in dismissing petitioner's Complaint with prejudice and that the Third Circuit was correct in affirming that ruling. From the outset of this litigation, Mr. Burchill

failed to comply with several court Orders, including the February 22, 1993 Order which directed that petitioner must file an Amended Complaint within twenty-one days or else have his case be dismissed with prejudice. Since Mr. Burchill did not comply with any of the court Orders, his case was properly dismissed. It simply may not be said that either court below committed a manifest abuse of discretion. Much to the contrary, the history of this case is marked by dilatory behavior exhibited by petitioner. Deadline after deadline was missed, even those deadlines which granted extensions of time.

Significantly, it must also be noted that the respondents have been caused to suffer harsh prejudice as a result of Mr. Burchill's conduct. Despite the fact that Mr. Burchill decided to institute this lawsuit, he then completely failed to prosecute his action. As a result, the respondents have been forced to spend much time and expense in filing motion after motion in order to deal with every action, and inaction, of Mr. Burchill.

This prejudice has been particularly burdensome to Dr. Gross because there are no direct averments against Dr. Gross contained in the Complaint. As Dr. Gross set forth in the Statement of the Case contained in this Brief, there are only two mentions of respondent in the pleading. In the first, at Paragraph 15 of the Complaint, Mr. Burchill avers "that after plaintiff was illegally committed to defendant Allentown Hospital/Healtheast, he briefly saw defendant Dr. Gross only on one occasion at approximately 7:30 A.M. on 5/14/90." The only other mention of Dr. Gross is contained in Paragraph 24(d), which is not actually an averment against Dr. Gross, but rather appears to be an averment against counsel who was appointed to represent Mr. Burchill and who allegedly misrepresented a planned evaluation by Dr. Gross.

As such, by the very language of the Complaint, it is clear that Dr. Gross saw Mr. Burchill on a single occasion; the Complaint contains absolutely no allegations as to any improper conduct by Dr. Gross on that

occasion, nor any other activity by Dr. Gross which operated to deprive petitioner of his constitutional rights.

Accordingly, Mr. Burchill failed to state any cause of action against Dr. Gross, and yet, respondent has had to suffer the consequences of being forced to participate in this litigation and to deal with the delay caused by Mr. Burchill. At some point, judicial intervention is necessary; Mr. Burchill's dilatory behavior is exactly the type of conduct which Federal Rule of Civil Procedure 41(b) seeks to prevent. Hence, it is patently evident that the ruling of the Third Circuit was wholly appropriate and well within the bounds of legal authority. Simply put, there was no abuse of discretion, and petitioner's Writ of Certiorari should be denied.

In addition, it is likewise important to address petitioner's claim regarding the alleged failure of the District Court to consider his Motion to Obtain Relief from Judgment. Specifically, once Mr. Burchill violated the court's Order regarding the timely need for him to file an Amended Complaint, the District Court dismissed his case by Order dated April 5, 1993 and entered April 6, 1993. Subsequently, on April 8, 1993, after the case was dismissed, petitioner filed an Amended Complaint and, on April 21, 1993, filed a Motion to Obtain Relief from Judgment. Shortly thereafter, on May 5, 1993, petitioner filed a Notice of Appeal.

With regard to the sequence of events which occurred in this litigation, it is first critical to note that, as the District Court recognized in its Order dated May 17, 1993, once Mr. Burchill filed an appeal, his Motion to Obtain Relief from Judgment had to be administratively dismissed since, at that point, the District Court had no jurisdiction to consider his request. Once petitioner filed a Notice of Appeal, jurisdiction was removed from the District Court. Therefore, Judge Van Antwerpen had no choice but to dismiss the Motion, and it must not be overlooked that the District Court made such an administrative dismissal "without prejudice".

Additionally, Fed.R.Civ.P. 60, addressing relief from a judgment or order, sets forth the bases of obtaining relief from a judgment or order. These include mistake, inadvertence, surprise or excusable neglect, newly discovered evidence, fraud, the judgment is void, the judgment has been satisfied or any other reason justifying relief from the operation of the judgment. It appears that Mr. Burchill requests that Rule 60 be applied in a way which would allow his Amended Complaint to be considered filed in a timely manner, despite its overt lateness.

As the docket entries in this matter reflect, it is undisputed that petitioner's Complaint was filed with the District Court on April 8, 1993, two days after the Order dismissing the case was entered. Moreover, regardless of when Mr. Burchill chooses to interpret the date of the March 9, 1993 Order, which directed that he file his Amended Complaint within twenty-one days, it is still clear that the Amended Complaint was filed beyond the deadline, even taking into account the three day period concerning notice by mail which is set forth in Fed.R.Civ.P. 6(e).

Correspondingly, in the Motion to Obtain Relief from Judgment, Mr. Burchill has offered no facts which would constitute "excusable neglect" for his late filing. Much to the contrary, the record illustrates that, throughout this litigation, Mr. Burchill acted in a dilatory manner. His behavior, as a whole, totally negates any allegation that petitioner's persistent neglect should be "excused".

Moreover, in his Petition, Mr. Burchill theorizes that, since the April 1993 Motion was filed within ten days of the questioned Order, the court could have treated it as a Fed.R.Civ.P. 59(e) motion. However, a mere review of the docket entries shows that petitioner's Motion for Relief from Judgment was filed with the District Court on April 21, 1993, fifteen days after the entry of the Order dismissing the case. Under

Fed.R.Civ.P. 59(e), a motion to alter or amend a judgment is required to be served within ten days after the entry of the judgment. The ten day time period under Fed.R.Civ.P. 59(e) is jurisdictional and cannot be extended in the discretion of the district court. *See EF Operating Corporation v. American Buildings*, 993 F.2d 1046 (3d Cir. 1993), *citing*, *De La Fuente v. Central Elec. Coop., Inc.*, 703 F.2d 63, 65 (3d Cir. 1983)(*per curiam*); *Welch v. Folsom*, 925 F.2d 666, 669 (3d Cir. 1991). Here, the judgment dismissing the case was entered on April 6, 1993, and Mr. Burchill's Motion for Relief from Judgment was not filed until April 21, 1993, well beyond the ten day deadline. Accordingly, Mr. Burchill's Motion does not fit within the ambit of a request to alter or to amend a judgment under Fed.R.Civ.P. 59(e). There simply was no proper basis for petitioner's request.

As a result of all the foregoing, it is apparent that the Third Circuit was correct in affirming the Order of the District Court. There was no abuse of discretion, and the ruling of the Third Circuit is in full accord with all legal authority, including both the Federal Rules of Procedure as well as all pertinent appellate case law. The decision of the Third Circuit has not created any conflicts nor does the decision depart from the accepted and usual course of judicial proceedings. Therefore, petitioner has completely failed to provide this Court with any justification or support for his present request.

CONCLUSION

For the reasons set forth above, respondent, Paul K. Gross, M.D., respectfully submits that the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

POST & SCHELL, P.C.

By: Barbara S. Magen

Barbara S. Magen, Esquire
Counsel of Record

Susan Ellis Wild, Esquire
1800 J.F.K. Boulevard
Philadelphia, PA 19103
(215) 587-1000

Attorneys for Respondent, Paul K. Gross, M.D.

(6)

Supreme Court, U.S.
FILED
MAR 9 1994
OFFICE OF THE CLERK

No. 93-1311

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT GEORGE BURCHILL,
Petitioner

v.

DOUGLAS KISH, et al.,
Respondent

On Petition For Writ of Certiorari
to the United States Court of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT

Robert L. Steinberg
District Attorney
Lehigh County Courthouse
PO Box 1548
Allentown, PA 18105
(610)820-3100
Attorney for Respondents
Steinberg, Waldron and
Lehigh County District
Attorney's Office

31

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the United States District Court for the Eastern District of Pennsylvania properly exercise its discretion in dismissing Petitioner's complaint due to his flagrant failure to comply with the Court's Orders?

Did the United States Court of Appeals for the Third Circuit properly exercise its discretion in affirming the Order of the District Court and taxing costs against the Petitioner, a licensed attorney, pursuant to Rule 39 of the Rules of Appellate Procedure?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENIAL OF THE WRIT	6
CONCLUSION	13
APPENDIX	
EXCERPT OF MOTION FOR SUMMARY JUDGMENT REVIEWING FACTS RESULTING IN ARREST OF PETITIONER	A-1
ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 22, 1993	A-4
ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 9, 1993	A-11
ORDER FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 5, 1993	A-12

TABLE OF AUTHORITIES

	Page
Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)..	12
Hewlett v. Davis, 844 F.2d 109 (3rd Cir. 1988).....	8
Link v. Wabach RR, 370 U.S. 626, 630 82 S.CT. 1386, 1388, 8 L.Ed.2d 734 (1962).....	8
McDonald v. McCarthy, 966 F.2d 112, 116 (3rd Cir. 1992).....	5
Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992).....	6
National Hockey League v. Metropolitan Hockey Club Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1975).	9
Paulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3rd Cir. 1984).....	6
Smith v. C.I.R., 926 F.2d 1470 (6th Cir. 1991).....	8
Sweeney v. St. Joseph's Hospital, 769 F.Supp. 747, 749 (M.D. Pa. 1991)..	8

No. 93-1311

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT GEORGE BURCHILL,
Petitioner

v.

DOUGLAS KISH, et al.,
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENTS BRIEF IN OPPOSITION

Respondents, Steinberg, Waldron and the Lehigh County District Attorney's Office respectfully requests that your Honorable Court deny the Petition for a Writ of Certiorari seeking review of the Judgement Order of the United States Court of Appeals For The Third Circuit, No. 93-1438, which affirmed the judgment of the district court

entered April 6, 1993, in No. 92-2776, and taxed costs against the Petitioner.

The Petitioner has not alleged any reasons for the Supreme Court to exercise its judicial discretion pursuant to Rule 10 of the Supreme Court Rules. Additionally, the Third Circuit has not rendered a decision in conflict with a decision of any other court.

COUNTERSTATEMENT OF THE CASE

On or about May 13, 1992, the Petitioner, Robert George Burchill, Esquire, filed a pro se complaint apparently alleging violations under the Federal Civil Rights Act, 42 U.S.C.A. Section 1983, with reference to Sections 1981, 1982, 1985, and 1988 as well. No action was undertaken by Petitioner until Respondents received complaints in the mail during the month of September. The underlying action surrounded the Petitioner's arrest on May 13, 1990, and

subsequent conviction following a jury trial on March 9, 1992, in state court[1]. The Petitioner's appeal on the state charges was dismissed by the Superior Court due to his failure to file a brief. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania is pending.

On October 5, 1992, Judge Van Antwerpen entered an Order directing Petitioner to file a response to Motions to Dismiss filed by Dr. Paul Gross and Allentown Hospital/ Healtheast, Inc. Petitioner filed untimely responses to those motions.

On November 9, 1992, Judge Van Antwerpen, upon consideration of Petitioner's "Motion to Enlarge Response Time", entered an Order requiring Petitioner

---

[1] An excerpt of the facts which led to Petitioner's arrest and which was submitted by way of affidavit to the United States District Court for the Eastern District of Pennsylvania in Support of a Motion for Summary Judgment is found in Appendix A-1.

to file a response by November 23, 1992, to a Motion to Dismiss and Motion for Summary Judgment filed by Respondents Robert L. Steinberg, District Attorney of Lehigh County, Kelly Waldron and the Lehigh County District Attorney's Office on October 21, 1992. On or about December 3, 1992, Petitioner filed untimely responses to those motions.

On December 8, 1992, Judge Van Antwerpen entered an Order directing Petitioner, a pro se attorney, to "file proper responses to [two Motions to Dismiss]". The Order explains that such information is necessary to aid the Court "in understanding the legal basis of [Petitioner's] claim". Petitioner was provided with "twenty-one (21) days [from] the date of [that] Order" to file a proper response to the Motions to Dismiss filed by the County of Lehigh and Clyde R. Bower, or "the case will be dismissed by the Court with prejudice". A response to one of

those motions was untimely filed on January 4, 1993.

On January 5, 1993, Judge Van Antwerpen entered a similar Order directing Petitioner to "file a proper response" to a Motion to Dismiss filed by Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department, and South Whitehall Township.

Petitioner filed a "Motion to Enlarge Time" and on January 15, 1993, Judge Van Antwerpen extended the time for response until February 5, 1993. The Order further reflects that "no extensions will be permitted". Even though a final deadline was established, Petitioner failed to file a response until February 11, 1993.

On February 22, 1993, Judge Van Antwerpen entered a seven (7) page Order granting various motions of appellees "without prejudice to [Petitioner's] right to plead

over within twenty-one (21) days of the date of this Order". The Order "expects and directs that [Petitioner] shall and will drop all causes of action which are improper or which lack merit, and file a timely new proper pleading asserting any remaining causes of action within twenty-one (21) days of the date of this Order". The Court, following a review of various aspects of civil rights caselaw, also issued a warning to Petitioner, and indicated that it "will impose substantial monetary or other sanctions for any causes of action in an Amended Complaint which are brought in bad faith".

On March 9, 1993, Judge Van Antwerpen, upon consideration of Petitioner's "Motion to enlarge Time", ordered that the amended complaint be filed "within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice. No further extension will be permitted". Petitioner, in

total disregard of that Order, failed to file a timely amended complaint, and instead filed an amended complaint on April 8, 1993.

As a result, on April 5, 1993, Judge Van Antwerpen dismissed Petitioner's case with prejudice as to all defendants. On or about April 17, 1993, Petitioner then filed a "Motion to Obtain Relief from Judgment" which displays what can at best be described as a cavalier attitude to the Court's instructions. Thereafter, on May 17, 1993, the Court entered an Order dismissing the motion due to appellant's appeal to the Third Circuit Court of Appeals.

On November 12, 1993, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment of the district court and taxing

costs[2] against Petitioner. On December 16, 1993, Petitioner's "Petition for Rehearing" was denied. On January 18, 1994, the Third Circuit denied Petitioner's "Motion for Stay of Mandates".

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petitioner, who is a licensed attorney acting pro se, not only failed to forward his complaint to the Respondents from May until September of 1992, but disregarded numerous deadlines imposed by the Court. Untimely, on April 5, 1993, after failing to timely file an amended complaint, Judge Van

---

[2] The "costs imposed pursuant to Rule 39 were in favor of Douglas Kish et al., Brief $105.78 and Paul K. Gross, M.D., Brief and Supplemental Appendix $197.40. Rule 39 defines "costs" as including normal administrative costs such as those incurred in preparing the record, printing fees, and the like. See McDonald v. McCarthy, 966 F.2d 112, 116 (3rd Cir. 1992).

Antwerpen dismissed with prejudice Petitioner's action which arises from his arrest and conviction in state court. It should be noted that while a Petition for Allowance of Appeal is pending in the Supreme Court of Pennsylvania, the Superior Court dismissed Petitioner's appeal due to his failure to file a brief. Therefore, Petitioner has repeatedly disregarded deadlines imposed by the state and federal courts.

The decision to dismiss a complaint for failure to comply with court orders rests in the sound discretion of the trial court, and is reviewable only for an abuse of discretion. The decision in Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992) reviews the various responsibilities prior to dismissal, but also gives "great deference" to the Court which has had contact with the litigant. The Court in Mindek recognizes various reasons, including policy ones, to

permit the trial court to implement the proper sanction for repeated failures to comply with court orders.

The Court also suggested that Paulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3rd Cir. 1984) is not to be mechanically applied nor must all factors be satisfied. However, utilizing Paulis it is apparent that the Court properly exercised its discretion. The responsibility for the dismissal rests firmly with Petitioner, who as an attorney, should be treated differently than other pro se litigants.

ARGUMENT FOR DENYING THE WRIT

A. THE COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING APPELLANT'S COMPLAINT DUE TO HIS FLAGRANT FAILURE TO COMPLY WITH THE COURT'S ORDERS.

The Petitioner, who is a licensed attorney representing himself, disregarded the deadlines imposed by the Court throughout the proceedings. In essence, he treated

deadlines as guidance not requirements. When Judge Van Antwerpen no longer tolerated such conduct and dismissed the complaint, Petitioner alleged unfair treatment or ambiguous orders. If patience is a virtue the Court exercised the utmost restraint in not dismissing the complaint earlier[3]. A review of the complaint and untimeliness of responses discloses either a lack of understanding or a total disregard for the Federal Rules of Civil Procedure. Such conduct justified an involuntary dismissal pursuant to F.R.C.P. 41(b).

The district court has the inherent power to enter a sua sponte order of dismissal. Link v. Wabach RR, 370 U.S. 626, 630, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962); Hewlett v. Davis, 844 F.2d 109 (3rd Cir.

---

[3] "If the Court were a camel with a shattered vertebrae, plaintiff's first amended complaint is the straw which broke it." Sweeney v. St. Joseph's Hospital, 769 F.Supp. 747, 749 (M.D. Pa. 1991).

1988); Smith v. C.I.R., 926 F.2d 1470 (6th Cir. 1991). Such a decision rests in the discretion of the trial court and is reviewable only for an abuse of discretion. Hewlett v. Davis, 844 F.2d at 114. In this case, Respondents acted to dismiss Petitioner's complaint, and even after the Court warned him, not only did Petitioner fail to comply with the time requirements, but also the procedural outline provided by the Court in its February 23, 1993 order.

In Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992) which involved a pro se Section 1983 action alleging excessive force and an unconstitutional search, the Third Circuit recognized that "[d]istrict court judges, confronted with litigants who flagrantly violate or ignore court orders, often have no appropriate or efficacious recourse other than dismissal of the complaint with prejudice". While Paulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3rd Cir.

1984) outlines the factors to be utilized in evaluating the propriety of dismissals, the Court in Mindek v. Rigatti, supra. recognized that "Paulis did not provide a magic formula... Not all of the Paulis factors need be satisfied in order to dismiss a complaint. Instead, the decision must be made in the context of the district court's extended contact with the litigant. Ultimately, the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court - a court which has had no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted". 964 F.2d at 1373.

The Court in Mindek, supra. citing and quoting from National Hockey League v. Metropolitan Hockey Club Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1975) offered the following insight from that opinion on

the discretion of the trial court:

> [t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.
> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 642-43, 96 S.Ct. at 2780-81.

While Paulis is not to be mechanically applied, it is apparent that utilizing such a

formula the district court properly exercised its discretion. The Petitioner, though pro se, is an attorney and his personal responsibility is far greater than the average pro se litigant. In Jourdan v. Jabe, 951 F.2d 108 (6th Cir. 1991) a pro se litigant's action was dismissed not because of "inartful pleading or any lack of legal training, but rather because he failed to adhere to readily comprehended court deadlines of which he was well aware. That he comprehended their significance is evidenced by his having sought there extension". Likewise, Petitioner requested extensions styled as "Motions to Enlarge Time" and was aware of his "obligation to proceed", but concluded the Court's orders were subject to his own timetable. Petitioner was personally responsible for the dismissal with prejudice of his complaint.

The prejudice to the Respondents is explained clearly in Sweeney v. St. Joseph's

Hospital, supra. For example, new factual allegations well over a year after the filing of the complaint will require an answer, the amended complaint will result in new motions to dismiss and responses, and this matter will fall into the same pattern that has previously existed. Compliance by Respondents, delay and disregard by Petitioner.

The history of Petitioner's case is also marked by dilatoriness. A complaint was filed in May of 1992, but no action was taken by Petitioner to forward the complaints until September of 1992. Thereafter, deadline after deadline was missed, even when no further extensions were specified. It can only be inferred that such actions were also willful[4].

---

[4] The district court, though warning appellant that monetary sanctions were possible, ultimately dismissed the action. The decision not to impose monetary sanctions and simply "march the kings horses up the hill" again in the future, Mindek, 964 F.2d at 1371 falls squarely in the court's discretion.

A review of the complaint, as well as the motions to dismiss, provide insight into the allegations, and disclose that the claim against the Respondents Steinberg, Waldron and the Office of the District Attorney, as well as the other Respondents, is not meritorious, but instead frivolous. The district court in its February 22, 1993, Order even warned Petitioner against actions brought in bad faith, and which lack merit. The amended complaint ultimately filed failed to comply with the deadline imposed and neglected to set forth allegations in separate courts. Also, the suppression and trial allegations, themselves, were rejected by the state courts both in pre-trial and post-trial motions. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

Petitioner did not even timely file his brief to the Third Circuit Court of Appeals, and his "Motion Regarding Time Enlargement"

denied responsibility for his misinterpretation of the requirements of the Court.

The reasoning in Mindek best sums up the justification for dismissing this case:

> We cannot even hope to quantify the extent to which cases such as the one before us clog our judicial system and interfere with the ability of diligent litigants to obtain prompt judicial resolution of their disputes. To overcome that interference, we must discipline ourselves not to engage in Monday-morning-quaterbacking which second-guesses conscientious district court judges. It is the district court judge who must strive to manage his or her calendar efficiently and, in so doing, may find it necessary to dismiss a litigant's complaint as a sanction for repeated failure to satisfy court orders.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

DATED: March 9, 1994

Respectfully submitted,

Robert L. Steinberg
District Attorney
Lehigh County Courthouse
PO Box 1548
Allentown, PA 18105
(610)820-3100
Attorney for Respondents
Steinberg, Waldron and
Lehigh County District
Attorney's Office

APPENDIX

EXCERPTS OF MOTION FOR SUMMARY JUDGMENT REVIEWING FACTS RESULTING IN PETITIONER'S ARREST

On the said evening, Cpl. Douglas Kish and Officer Scott Rehrig of the South Whitehall Police Department responded on two occasions to 2120 Latta Street in South Whitehall Township. Their initial response was necessitated due to a report of shots being fired in the area. Initially, when they responded, they neither observed nor heard anything. However, at 10:18 p.m. a little less than two hours later, they received a report "that there were shots being fired from that particular address". While the officers were responding, they received additional information of a woman screaming.

The officers, upon their arrival, exited their vehicles and approached the defendant's

Supreme Court, U.S.
FILED
931311 FEB 10 1994
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1994

ROBERT GEORGE BURCHILL, Petitioner

vs.

DOUGLAS KISH, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Attorney R.G. Burchill

Pro Se Petitioner

2120 Latta Street

Allentown, PA 18104

215-434-2101

33 pp

QUESTIONS PRESENTED

1. Where the issue is raised, do the Fed. R. Civ. P., and related precedent require reinstatement of a complaint, dismissed as the result of a prejudice free, procedural tecnicality, in order that the merits of the matter can be considered?

2. Did the district court deny due process by failing to act regarding a remedial motion concerning complaint reinstatement?

3. Did the court of appeals deny due process when it sanctioned the district court's departure from the accepted and usual course of judicial proceeding, in affirming the lower court's dismissal, to the extent that the Supreme Court's power of supervision is thereby required, as is available thru a Writ of Certiorari?

4. Did the court of appeals, in affirming the lower court's dismissal, render a decision which was in conflict with existing Supreme Court and circuit court of appeals precedents, to the extent that the Supreme Court's power of supervision is thereby required, as is available thru a Writ of Certiorari?

5. Did the court of appeals compromise appellant's constitutional rights when it denied in banc reconsideration, in apparent conflict with Fed. R. App. P. 35(b), and is a Writ of Certiorari the only remedy presently available to accomplish justice?

6. Is there a constitutional need to reconsider this matter consequent to an intervening change in Fed. R. App. P. (a)(4)(F) which was apparently designed to address the involved dilemma?

LIST OF PARTIES

APPELLANT — Robert George Burchill

APPELLEES — Douglas Kish,
Scott R. Rehrig,
Michael Harbove,
Donald K. Macconnell,
Arthur Spitko,
Thomas Toth,
Southwhitehall Police Department,
Southwhitehall Township,
Kelly Waldron,
Robert L. Steinberg,
Lehigh County District Attorney's Office,
Lehigh County,
Allentown Hospital/ Healtheast,
Dr. Paul Gross,

Clyde R. Bower,

John Doe,

Richard Roe,

TABLE OF CONTENTS

	Page(s)
Related Reports	1
Jurisdictional Basis	2
U.S. Const. amend. V	3
U.S. Const. amend. XIV	3
Title 28 U.S.C. §2106	4
Statement of the Case	5
Argument	11
Appendix A	21
Appendix B	22
Appendix C	23

TABLE OF AUTHORITIES

page(s)

Boddie v Conn., 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 113 (1971) 14

Bryan v United States, 338 U.S. 552, 94 L. Ed. 335 (1949) 13

Conley v Gibson, 335 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) 13

Delgado v McTighe, 522 F. Supp. 886 (1981). 17

Finch v City of Vernon, 845 F.2 256 (1988). 16

Foman v Davis, 371 U.S. 178, 83 S.Ct. 227, 92 L.Ed.2d 222 13,15

Griggs v Provident Consumer Discount Co., 459 U.S. 56, 193 S.Ct. 400, 74 L.Ed.2d 225 (1982) 15

Holt v Comm. of Virginia, 381 U.S. 131, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965) 14

Hormel v Helvering, 312U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941) 14

Lassiter v Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) 15

New Castle County v Hertford Accident and Indemnity Company, 933 F.2d 1162 (1991) . 16

Osterneck v Ernst & Whinney, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) 15,16

Rados v Celotex Corp., 809 F.2d 170 (1986) 16

Rosen v Rucker, 905 F.2d 702 (1990) 16

Skagerberg v Oklahoma, 797 F.2d 881 (1981) 16

Surowitz v Hilton Hotels Corp., 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed. 807 (1966) .. 14

Torres v Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L. Ed.2d 285 (1988) 14

United States v Hougham, 81 S.Ct., 364 U. S. 310 (1960) 14

Walling v Reuter, Inc., 321 U.S. 671, 64 S.Ct. 826, 88 L.Ed. 1001 18

Title 28 U.S.C. §2106 4,13

Fed. R. Civ. P.1 11,13

Fed. R. Civ. P. 6(b) 11,13

Fed. R. Civ. P. 6(e) 11,12

Fed. R. Civ. P. 11 13

Fed. R. Civ. P. 59(e) 12,15

16,18

Fed. R. Civ. P. 86 18

Fed. R. App. P. 4(a)(4)(c) 16

Fed. R. App. P. 4(a)(4)(F) 18

Fed. R. App. P. 35(b) 10.17

RELATED REPORTS

There are no official or unofficial reports of opinions delivered in this case by other courts or administrative agencies, other than those included in the appendix attached hereto.

GROUNDS UPON WHICH THE SUPREME COURT'S JURISDICTION IS INVOKED

i) The judgement sought to be reviewed was entered on 11/12/93.

ii) An order denying rehearing in banc was entered on 12/16/93.

iii) Title 28, U.S.C. §1254(1) is believed to confer jurisdiction upon the Supreme Court.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgement, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgement, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Petitioner initiated a federal civil rights action seeking redress for wrongs which took place during or as the result of an arrest which took place in his home, on Mother's Day, 1990. The legality of this matter is under appeal before the Pennsylvania state court system.

At the time of the arrest, an undisclosed number of photographs were taken. Although such action was described later as being the result of exigent circumstances, one individual left, obtained a camera, and thereafter took pictures at will for several hours.

During this time continual searching of the home took place while repeated requests regarding consent to search were made. Such solicitations were accompanied with the warning, "Consent or we'll only get a

judge out of bed, and get a search warrant, anyway."

In addition to this outrageous invasion of privacy, various items of personal property were either taken outright, or confiscated without justification.

After a considerable length of time and without an indication of the reason for the arrest, the unresisting petitioner, who had been alone in the home, was removed in handcuffs and shackles. Transportation to police headquarters and then to a hospital for an unlawful mental commitment followed thereafter.

Petitioner's septuagenarian parents arrived after a total of five armed officers had begun roaming throughout the house. They continued the repeated denial of consent to search.

The officer in charge was then heard humorously speaking into the telephone,

"No search, then its a 302b (mental commitment)". Subsequently, petitioner discovered that falsehoods were used to establish probable cause for a commitment warrant, in clear violation of the Pennsylvania Mental Health Law.

At the hospital, petitioner was forced to remain undressed and shackled in isolation, for three days. Such treatment was supposedly the result of the unavailabilty of regular facilities. Finally, after transfer to another hospital and threatening to get a court order, release was obtained. The involved police personnel had maintained contact with those in charge and importuned against freedom for five days.

During the course of the state proceedings which followed, petitioner was subjected to repeated and unnecessary denials of due process, which petitioner believes are clearly official oppression. Such un-

warranted governmental activities include:

1. appointing defense counsel without notice to petitioner.

2. seeking another unlawful commitment after an appeal was taken.

3. repeated transcription irregularities at each and every stage of the matter.

4. needless and unwarranted issuance of bench warrants.

5. witholding clear exculpatory evidence.

6. being forced to go to trial, at the last minute, with defense counsel, that did not take petitioner's version of the facts, nor engage in any meaningful cross examination regarding the information the prosecution entered.

7. seeking an unconscionable third mental evaluation, immediately upon acquittal, based on a fabricated threat petitioner was supposed to have made in 1990, which is

clearly beyond the 30 day period of the Mental Health Law.

Petitioner filed a federal civil rights action in May of 1992, pursuant to jurisdiction under Title 28 U.S.C. §1343. After approximately 9 months and in excess of 40 docket entries concerning procedural matters, the district court issued an order requiring amendment of the complaint. This order contained explicit instructions, which included admonitions concerning the good faith requirements of verification (Fed. R. Civ. P. 11).

Petitioner served an amendment to the complaint on 4/5/93, the last day of the permitted time period. The same day, the court dismissed petitioner's action because amendment had not been filed.

When petitioner received no response regarding a motion which sought reinstatement of the action, an appeal was filed, in

accordance with Title 28 U.S.C. §1291. The clerk's office indicated that petitioner's subsequent appellate brief had no conclusion. It then related that there was a conclusion but no signed copy, and in any case it was untimely. Petitioner was forced to file a motion with the clerk, regarding the time considerations of Fed. R. Civ. P 26(c), in order to have the appellate brief filed.

Thereafter, the court of appeals summarily adjudged the dismissal affirmed on 11/12/93, and denied suggestion for in banc consideration on 12/16/93. The latter consideration indicates that "other available" judges, rather than all the judges in regular active service, which appears to be required by Fed. R. App. P. 35(b), were involved.

Petitioner believes presentation of the above facts are not impertinent to present review. Their merits are important in eval-

uating the effect of dismissal for non prejudical, technical error, relative to the administration of justice.

ARGUMENT

When petitioner's federal civil rights action was dismissed by the district court for failure to file instead of serve an amendment to the complaint, a right arose to have the matter reinstated.

Petitioner sought to remedy the perfunctory culmination of his only viable means of redress for blatant and egregious civil wrongs, via motion, which was served on 4/17/93. This application requested relief for petitioner's good faith misunderstanding under Fed. R. Civ. P 6(b) as excusable neglect, under Fed. R. Civ. P. 60 as confusion or mistake, and under Fed. R. Civ. P. 1 in the interest of justice. Even though the district court could also have

acted under Fed. R. Civ. P. 59, see infra, no meaningful response was forthcoming and petitioner was forced to appeal the matter.

Although petitioner's brief addressed the lower court's dismissal and failure to act thereon, as abuse of discretion, the issues of injustice relative to such a prejudice free, procedural termination and consequent denial of due process were clearly raised. Petitioner also sought treatment of the problem under Fed. R. Civ. P. 59, which requires a ten day time consideration. As the termination order was entered on 4/7/93, and calculation of the Fed. R. Civ. P. 59 time constraint is controlled by Fed. R. Civ. P. 6(a) and (e), the aforementioned motion service was accomplished within the prerequisite 10 days of dismissal.

Several of the appellees disputed this time determination in their briefs and made unsubstantiated allegations which indicated

that petitioner did not obey court directives. These material misrepresentations appear to be contrary to Fed. R. Civ. P. 11, as well as other ethical standards of professional conduct.

In any case, the court of appeals has full authority to act regarding any matter that is duly raised before it. Title 28 U. S.C. §2106, Bryan v United States, 338 U.S. 552, 94 L. Ed. 335 (1949).

On 11/12/93, the court of appeals adjudged the district court's dismissal affirmed.

The Fedral Rules of Civil Procedure provide for just,speedy and inexpensive determinations. Fed. R. Civ. P. 1. Therefore, dismissal for a mere technicality should not preclude the merits from being brought to light. Foman v Davis, 371 U.S. 178, 83 S.Ct 227, 92 L.Ed.2d 222 (1962), Conley v Gibson, 335 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957),

Hormel v Helvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941), Surowitz v Hilton Hotels Corporation, 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed. 807 (1966), Torres v Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d (1988), United States v Hougham, 81 S.Ct. 13, 364 U.S. 310 (1960).

When this right to reinstatement is not recognized, as it was not before both the district court and the court of appeals, petitioner is also denied due process of law.

Fundamental due process requires a fair and meaningful hearing. Boddie v Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L. Ed. 113,(1971). Without allowance of petitioner's amended complaint there can be no right to any hearing which necessarily includes the right to file pleadings. Holt v Commonwealth of Virginia, 381 U.S. 131, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965).

Due process is the constitution's em-

bodiment of society's conception of just legal principles as are found thru application of the 5th and 14th Amendments to problem situations. U.S. Const. amend. V,XIV. Petitioner believes that preventing the merits of this matter (see Statement of the Case, supra) from proper legal course for a benign error is clearly a violation of due process. Lassiter v Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981).

When the court of appeals failed to act regarding the Fed. R. Civ. P. 59 considerations petitioner raised during the involved appeal, its order was contrary to decisions of the Honorable Court and decisions of other courts of appeal as well. Osterneck v Ernst & Whinney, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), Griggs v Provident Consumer Discount Co., 459 U.S. 56, 193 S.Ct. 400, 74 L.Ed.2d 225 (1982), Foman v Davis,

371 U.S. 178, 83 S.Ct. 227, 92 L. Ed.2d 222 (1962), Rosen v Rucker, 905 F.2d 702 (1990), New Castle County v Hertford Accident and Indemnity Company, 933 F.2d 1162 (1991), Rados v Celotex Corp., 809 F.2d 170 (1986), Skagerberg v Oklahoma, 797 F.2d 881 (1986), Finch v. City of Vernon, 845 F.2d 256 (1988).

The aforestated cases support the proposition that petitioner's timely post judgement motion, no matter what its nomenclature, should have been treated as a Fed. R. Civ. P. 59(e) motion, which necessarily stayed any appeal in this matter, pursuant to Fed. R. App. P. a(4)(C), until the district court could determine the said motion. See Osterneck v Ernst, supra, where the Supreme Court elucidated a standard for determining which timely post judgement motions qualify for this consideration. Apparently, only those motions which involve

consideration of matters salient to, and not collateral to, a judgement on the merits below, will be so classified.

In this light, because the district court has handled such matters with other than perfunctory dismissal, petitioner did not receive equal protection of the law. Delgado v McTighe, 522 F. Supp. 886 (1981).

Petitioner believes there was a similar denial when rehearing was sought before the court of appeals, in banc. It appears, same was denied through submittal to all available judges in regular active service rather than all judges in regular active service pursuant to Fed. R. App. P. 35(b). See Appendix C. As a result, petitioner was not afforded the ability to present information regarding possibly misconstrued aspects of this matter, via rehearing, as all other similarly situated litigants might.

The court of appeals also refused to grant a stay pending this application, indicating that such stay would not be required because there were no substantiative rights being compromised. Thereafter petitioner was forced to respond to the clerk's taxing of costs. Such activity appears, at minimum to chill the right to seek the present review.

Fed. R. App. P. (a)(4)(F) has been amended and its effective date was 12/1/93. If this amendment is applied under Fed. R. Civ. P. 86, resolution of this matter may be obtained by treating the Fed. R. Civ. P. 60, district court motion as a Fed. R. Civ. P. 59 motion (see supra). Such intendance would appear to reconcile previously considered due process concerns. Walling v Reuter, Inc. 321 U.S. 671, 64 S.Ct. 826, 88 L.Ed. 1001 (1944).

RESPECTFULLY SUBMITTED:

Attorney R.G. Burchill

Pro Se Petitioner

2120 Latta street

Allentown, PA 18104

215-434-2101

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-1438

ROBERT GEORGE BURCHILL,

Appellant

v.

DOUGLAS KISH, et al.,

Appellees

JUDGEMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgement of the district court entered April 6, 1993, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

(s) Walter K. Stapleton

Circuit Judge

APPENDIX A

DATED: NOV 12 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 92-2776

ROBERT GEORGE BURCHILL,

Appellant

v.

DOUGLAS KISH, et al.,

Appellees

ORDER

AND NOW, this 5th day of April, 1993, the Court having previously dismissed all defendants by an annotated Order of February 22, 1993 with a notation that "any causes of action not reasserted in an Amended Complaint within twenty-one (21) days will be deemed dismissed with prejudice," and the Court having issued an Order on March 9, 1993 granting plaintiff's motion to enlarge time, which Order granted an additional twenty-one (21) day period of time from March 9, 1993 for the filing of an A-

mended Complaint with the express notation that "plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice," and it appearing that no such Amended Complaint has been filed, NOW THEREFORE, the dismissals of February 23, 1993 are hereby deemed to be with prejudice and this case is DISMISSED WITH PREJUDICE AS TO ALL DEFENDANTS AND CLOSED.

BY THE COURT

(S) Franklin S. Van

Antwerpen, U.S.D.J.

ENTERED: 4-6-93

CLERK OF COURT

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-1438

ROBERT GEORGE BURCHILL,

Appellant

v.

DOUGLAS KISH, et al.,

Appellees

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

APPENDIX C

By the Court,

(s) Walter K. Stapleton

Circuit Judge

Dated: DEC 16 1993

Supreme Court, U.S.
FILED
MAR - 4 1994
OFFICE OF THE CLERK

No. 93-1311

In The

Supreme Court of the United States

October Term, 1993

ROBERT GEORGE BURCHILL,

Petitioner,

versus

DOUGLAS KISH, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Third Circuit

BRIEF IN OPPOSITION

BLAKE C. MARLES,
Counsel of Record
JOHN P. SERVIS
WEAVER, MOSEBACH, PIOSA, HIXSON & MARLES
One Windsor Plaza, Suite 200
7535 Windsor Drive
Allentown, PA 18195-1014
(610) 366-8000
Counsel for Respondents Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department and South Whitehall Township

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S COMPLAINT WITH PREJUDICE BASED ON PETITIONER'S FAILURE TO OBEY A COURT ORDER REQUIRING HIM TO FILE AN AMENDED COMPLAINT BY A DATE CERTAIN.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Glass v. Seaboard C.L.R. Co., 714 F.2d 1107 (11th Cir. 1983) 6

Hewlett v. Davis, 844 F.2d 109 (3rd Cir. 1988) 4

Link v. Wabach R.R., 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386 (1962) 3

McConnell v. Medical & Ben. Plan, 778 F.2d 521 (9th Cir. 1985) 6

Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992) 4

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951) 3

Shempp v. School District, 184 F.Supp. 381 (E.D. Pa. 1959) 5

U.S.N. Co. v. American Express Co., 55 F.R.D. 31 (E.D.Pa. 1972) 3

Wiss v. Weinberger, 415 F.Supp. 293 (E.D. Pa. 1976) 5

RULES

Fed. R.Civ.P. 5(b) 5

Fed. R.Civ.P. 5(e) 5

Fed. R.Civ.P. 6 ..... 2, 5

Fed. R.Civ.P. 6(e) 5

Fed. R.Civ.P. 41(b) 2, 3, 4

Fed. R.Civ.P. 59(e) 5, 6

Fed. R.Civ.P. 60 ..... 2, 4

TABLE OF AUTHORITIES – Continued

Page

Sup. Ct. Rule 10.1 3

Sup. Ct. Rule 10.1(a) 2

COUNTERSTATEMENT OF THE CASE

Petitioner, Robert George Burchill, filed a complaint pursuant to 42 U.S.C. Section 1983 alleging that his civil rights were violated by Respondents Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department and South Whitehall Township (hereinafter the "Township Respondents") and eight (8) additional respondents. Petitioner's complaint alleged that the Township Respondents violated Petitioner's constitutional rights during the May 13, 1990 arrest of Petitioner and search of his home.

In response to various motions filed by all of the respondents, the United States District Court for the Eastern District of Pennsylvania (hereinafter the "District Court") entered an order on February 22, 1993 conditionally dismissing Petitioner's complaint subject to his right to file an amended complaint within 21 days. On March 9, 1993, the District Court entered an order granting Petitioner's motion to enlarge the time for filing an amended complaint. Under the terms of the March 9, 1993 order:

> Plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this order or this case will be dismissed with prejudice. *NO FURTHER EXTENSIONS WILL BE PERMITTED.*

Accordingly, Petitioner's amended complaint was to be filed by March 31, 1993, 21 days after the March 9, 1993 order. Petitioner failed to file an amended complaint within the time period prescribed. Thereafter, on April 6,

1993 the District Court entered an order dismissing Petitioner's complaint with prejudice as to all respondents.

Petitioner then filed an appeal to the United States Court of Appeals for the Third Circuit (hereinafter the "Court of Appeals"). The Court of Appeals, by order dated November 12, 1993, affirmed the April 6, 1993 judgment of the District Court. By order dated December 16, 1993, the Court of Appeals denied Petitioner's petition for rehearing. Petitioner thereafter filed a petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Petitioner fails to identify how the decision of the Court of Appeals conflicts with the decision of another federal court of appeals on the same matter so as to call for an exercise of this Court's power of supervision. *See* Rule 10.1(a) of the Rules of this Court. The decisions of the District Court and the Court of Appeals are consistent with the judicial interpretations of Fed. R.Civ.P. 41(b) which confirm a court's power to dismiss an action based on a plaintiff's failure to comply with an order of court.

Moreover, Petitioner has failed to offer any reason justifying relief from judgment under Fed. R.Civ.P. 60. In essence, Petitioner's argument is that the rules regarding computation of time set forth in Fed. R.Civ.P. 6 were not applied properly. Not only is this argument flawed, such an issue is not one which involves any "special and important reasons" justifying the grant of certiorari. Rule 10.1(a) of the Rules of this Court.

ARGUMENT

I. This Case Does Not Involve Special or Important Reasons for The Granting of Certiorari

As the Rules of this Court provide, certiorari will be granted "only when there are special and important reasons therefor". Rule 10.1. The case at bar involves no such reasons and the decisions of the courts below realistically have no impact on anyone other than the parties to this suit. This Court has previously held that certiorari is to be granted only in cases involving principles, the settlement of which is important to the public generally rather than to the parties specifically, and in cases where there is a real conflict of opinion and authority between courts of appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951).

In the present case, the decisions below involved the straightforward application of the Federal Rules of Civil Procedure. Petitioner has identified no decision of any court of appeals that conflicts with the decisions of the courts below.

II. Dismissal of Petitioner's Suit Under Federal Rule of Civil Procedure 41(b) Was Proper

Under Federal Rule of Civil Procedure 41(b), where a plaintiff fails to comply with an order of court, a defendant may move for dismissal of the action. It is also well-settled that a court may dismiss an action on its own motion where a plaintiff does not comply with an order of court. *Link v. Wabach R.R.*, 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386 (1962); *U.S.N. Co. v. American Express Co.*, 55

F.R.D. 31 (E.D.Pa. 1972). The March 9, 1993 order of the District Court was clear and self-executing. The order mandated that Petitioner's amended complaint be filed within 21 days of the date of the order or the case would be dismissed with prejudice. There is no dispute that Petitioner's amended complaint was filed beyond this deadline.

A dismissal under Fed. R.Civ.P. 41(b) for failure of a plaintiff to comply with an order of court is a matter resting within the sound discretion of the trial court. Such a dismissal will be reversed on appeal only for an abuse of discretion. *Hewlett v. Davis,* 844 F.2d 109 (3rd Cir. 1988). Where, as here, a litigant flagrantly violates or ignores a court order, a district court often has no appropriate recourse other than dismissal. *Mindek v. Rigatti,* 964 F.2d 1369 (3rd Cir. 1992).

III. Petitioner Did Not Advance Any Basis For Obtaining Relief From Judgment

Fed. R.Civ.P. 60 sets forth the bases for obtaining relief from a judgment or order: clerical mistakes; mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud; the judgment is void; the judgment has been satisfied; any other reason justifying relief from the judgment. Petitioner has not articulated any of these bases. Indeed, Petitioner filed his motion for relief from judgment on April 21, 1993 with the District Court, and then, before that motion could be considered, he filed an appeal to the Court of Appeals. As the District Court correctly observed, when Petitioner filed his appeal he deprived the District Court of jurisdiction over the

case and prevented it from ruling on his motion for relief from judgment. *Shempp v. School District,* 184 F.Supp. 381 (E.D. Pa. 1959).

Petitioner's argument is based upon an erroneous interpretation of Fed. R.Civ.P. 6 that would presumably allow his amended complaint to be considered filed in a timely manner. It is beyond dispute that Petitioner's amended complaint was filed with the District Court on April 8, 1993, two days after the order dismissing the case was entered. Subsection(e) of Fed. R.Civ.P. 6 provides that when a party is required to act within a prescribed period after the service of notice by mail, 3 days shall be added to the prescribed period. Regardless of whether Petitioner chooses to interpret the date of the District Court's order as March 9, 1993 or March 11, 1993, his amended complaint was filed beyond the deadline taking into account the 3-day period set forth in Fed. R.Civ.P. 6(e).

Petitioner claims that because his amended complaint was mailed on April 5, 1993, this constitutes timely filing. Under Fed. R.Civ.P. 5(e), "filing with the court" is defined as the filing of a pleading or other paper with the clerk of court. Filing does not occur when a pleading or paper is deposited in the mail; rather, it occurs when the pleading is received by the clerk of court or the judge, in an appropriate case. Petitioner's assertion confuses the service of his amended complaint with the filing of his amended complaint. Under Fed. R.Civ.P. 5(b), service by mail is complete upon mailing. However, the same is not true of papers filed by mail. *Wiss v. Weinberger,* 415 F.Supp. 293 (E.D. Pa. 1976). In summary, Petitioner failed to file a timely amended complaint in violation of a court order.

IV. To the Extent That Petitioner's Motion Is Considered a Motion to Alter or Amend a Judgment It was Not Timely Filed

Federal Rule of Civil Procedure 59(e) requires that a motion to alter or amend a judgment be served within ten days after the entry of the judgment. The ten-day time period contained in this Rule is jurisdictional and cannot be extended in the discretion of the District Court. *See Glass v. Seaboard C.L.R. Co.*, 714 F.2d 1107 (11th Cir. 1983). In the case at bar, the judgment dismissing the case was entered on April 6, 1993 and Petitioner's motion was not served until April 17, 1993, beyond the ten-day deadline. This time limitation is to be strictly construed. *McConnell v. Medical & Ben. Plan*, 778 F.2d 521 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

WEAVER, MOSEBACH, PIOSA, HIXSON & MARLES

BLAKE C. MARLES, ESQUIRE
Counsel of Record

JOHN P. SERVIS, ESQUIRE
One Windsor Plaza, Suite 200
7535 Windsor Drive
Allentown, PA 18195-1014
(610) 366-8000

Supreme Court, U.S.
FILED
MAR 10 1994
OFFICE OF THE CLERK

No. 93-1311

In The

Supreme Court of the United States

October Term, 1993

ROBERT GEORGE BURCHILL,

Petitioner,

versus

DOUGLAS KISH, *et al.*,

Respondents.

Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION

Henry S. Perkin,
Counsel of Record
Lehigh County Department
of Law
5th & Hamilton Streets
Allentown, PA 18101
(610) 820-3180
Counsel for the
Respondent
County of Lehigh

QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S COMPLAINT WITH PREJUDICE BASED ON PETITIONER'S FAILURE TO OBEY A COURT ORDER REQUIRING HIM TO FILE AN AMENDED COMPLAINT BY A DATE CERTAIN.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Glass v. Seaboard C.L.R. Co.,714 F.2d 1107 (11th Cir. 1983) 6

Hewlett v. Davis, 844 F.2d 109 (3rd Cir. 1988) 4

Link v. Wabash R.R., 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386 (1962) 3

McConnell v. Medical & Ben. Plan, 778 F.2d 521 (9th Cir.1985) 6

Mindek v. Rigatti, 964 F.2d 1369 (3rd Cir. 1992) 4

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 95 L.Ed. 479. 71 S.Ct. 453 (1951) 3

Shempp v. School District, 184 F.Supp. 381 (E.D. Pa. 1959) 5

U.S.N. Co. v. American Express Co., 55 F.R.D. 31 (E.D.Pa. 1972) 3

Wiss v. Weinberger, 415 F.Supp. 293 (E.D. Pa. 1976) 5

RULES

Fed. R.Civ.P. 5(b) 5

Fed. R.Civ.P. 5(e) 5

TABLE OF AUTHORITIES - Continued

Page

Fed. R.Civ.P. 6 2

Fed. R.Civ.P. 6(e) 5

Fed. R.Civ.P. 41(b) 2, 3, 4

Fed. R.Civ.P. 59(e) 5, 6

Fed. R.Civ.P. 60 . . . . . 2, 4

Sup. Ct. Rule 10.1 3

Sup. Ct. Rule 10.1(a) 2

COUNTERSTATEMENT OF THE CASE

Petitioner, Robert George Burchill, and attorney, admitted to the practice of law before the Supreme Court of Pennsylvania and the United States District Court for the Eastern District of Pennsylvania, filed a complaint pursuant to 42 U.S.C. Section 1983 alleging that his civil rights were violated by Respondent County of Lehigh "County Respondents") and sixteen (16) additional respondents. Petitioner's complaint alleged that the County Respondents violated Petitioner's constitutional rights during the May 13, 1990 arrest of Petitioner and search of his home.

In response to various motions filed by all of the respondents, the United States District Court for the Eastern District of Pennsylvania (hereinafter the "District Court") entered an order on February 22, 1993 conditionally dismissing Petitioner's complaint subject to his right to file an amended complaint within 21 days. On March 9, 1993, the District Court entered an order granting Petitioner's motion to enlarge the time for filing an amended complaint. Under the terms of the March 9, 1993 order:

> Plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this order or this case will be dismissed with prejudice. *NO FURTHER EXTENSIONS WILL BE PERMITTED.*

Accordingly, Petitioner's amended complaint was to be filed by March 31, 1993, 21 days after the March 9, 1993 order. Petitioner, a practicing attorney, failed to file an amended complaint within the time period prescribed. Thereafter, on April 6,1993 the District Court entered an order dismissing Petitioner's complaint with prejudice as to all respondents.

Petitioner then filed an appeal to the United States

Court of Appeals for the Third Circuit (hereinafter the "Court of Appeals"). The Court of Appeals, by order dated November 12, 1993, affirmed the April 6, 1993 judgment of the District Court. By order dated December 16, 1993, the Court of Appeals denied Petitioner's petition for rehearing. Petitioner thereafter filed a petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Petitioner fails to identify how the decision of the Court of Appeals conflicts with the decision of another federal court of appeals on the same matter so as to call for an exercise of this Court's power of supervision. See Rule 10.1(a) of the Rules of this Court. The decisions of the District Court and the Court of Appeals are consistent with the judicial interpretations of Fed. R.Civ.P 41(b) which confirm a court's power to dismiss an action based on a plaintiff's failure to comply with an order of court.

Moreover, Petitioner has failed to offer any reason justifying relief from judgment under Fed. R.Civ.P. 60. In essence, Petitioner's argument is that the rules regarding computation of time set forth in Fed. R.Civ.P. 6 were not applied properly. Not only is this argument flawed, such an issue is not one which involves any "special and important reasons" justifying the grant of certiorari. Rule 10.1(a) of the Rules of this Court.

ARGUMENT

I. This Case Does Not Involve Special or Important Reasons for The Granting of Certiorari

As the Rules of this Court provide, certiorari will be granted "only when there are special and important reasons

therefor". Rule 10.1. The case at bar involves no such reasons and the decisions of the courts below realistically have no impact on anyone other than the parties to this suit. This Court has previously held that certiorari is to be granted only in cases involving principles, the settlement of which is important to the public generally rather than to the parties specifically, and in cases where there is a real conflict of opinion and authority between courts of appeals. *NLRB v. Pittsburgh S.S. Co.*,340 U.S.498, 95 L.Ed. 479, 71 S.Ct. 453 (1951).

In the present case, the decisions below involved the straightforward application of the Federal Rules of Civil Procedure and the very clearly stated directives by the trial court. Petitioner has identified no decision of any court of appeals that conflicts with the decisions of the courts below.

II. Dismissal of Petitioner's Suit Under Federal Rule of Civil Procedure 41(b) Was Proper

Under Federal Rule of Civil Procedure 41(b), where a plaintiff fails to comply with an order of court, a defendant may move for dismissal of the action. It is also well settled that a court may dismiss an action on its own motion where a plaintiff does not comply with an order of court. *Link v. Wabach R.R.*, 370 U.S.626,8 L.Ed.2d 734, 82 S.Ct. 1386 (1962); *U.S.N. Co. v. American Express Co.*, 55 F.R.D. 31 (E.D.Pa. 1972). The March 9, 1993 order of the District Court was clear and self -executing. The order mandated that Petitioner's amended complaint be filed within 21 days of the date of the order or the case would be dismissed with prejudice. There is no dispute that Petitioner's amended complaint was filed beyond this deadline. Petitioner was given ample opportunity to properly state his claims and file the

necessary pleadings.

A dismissal under Fed. R.Civ.P. 41(b) for failure of a plaintiff to comply with an order of court is a matter resting within the sound discretion of the trial court. Such a dismissal will be reversed on appeal only for an abuse of discretion. *Hewlett n. Davis*, 844 F.2d 109 (3rd Cir.1988). Where, as here, a litigant flagrantly violates or ignores a court order, a district court often has no appropriate recourse other than dismissal. *Mindek v. Rigatti*, 964 F.2d 1369 (3rd Cir. 1992).

III. Petitioner Did Not Advance Any Basis For Obtaining Relief From Judgment

Fed. R.Civ.P. 60 sets forth the bases for obtaining relief from a judgment or order: clerical mistakes; mistake, inadvertence, surprise or excusable neglect; newly discovered evidence; fraud; the judgment is void; the judgment has been satisfied; any other reason justifying relief from the judgment. Petitioner has not articulated any of these bases. Indeed, Petitioner filed his motion for relief from judgment on April 21, 1993 with the District Court, and then, before that motion could be considered, he filed an appeal to the Court of Appeals. As the District Court correctly observed, when Petitioner filed his appeal he deprived the District Court of jurisdiction over the case and prevented it from ruling on his motion for relief from judgment. *Shempp v. School District*, 184 F.Supp. 381 (E.D. Pa. 1959).

Petitioner's argument is based upon an erroneous interpretation of Fed. R.Civ.P. 6 that would presumably allow his amended complaint to be considered filed in a timely manner. It is beyond dispute that Petitioner's amended complaint was filed with the District Court on April 8,1993,

two days after the order dismissing the case was entered. Subsection(e) of Fed. R.Civ.P.6 provides that when a party is required to act within a prescribed period after the service of notice by mail,3 days shall be added to the prescribed period. Regardless of whether Petitioner chooses to interpret the date of the District Court's order as March 9, 1993 or March 11, 1993, his amended complaint was filed beyond the deadline taking into account the 3-day period set forth in Fed. R.Civ.P. 6(e).

Petitioner claims that because his amended complaint was mailed on April 5,1993, this constitutes timely filing. Under Fed. R.Civ.P.5(e), "filing with the court" is defined as the filing of a pleading or other paper with the clerk of court. Filing does not occur when a pleading or paper is deposited in the mail; rather, it occurs when the pleading is received by the clerk of court or the judge, in an appropriate case. Petitioner's assertion confuses the service of his amended complaint with the filing of his amended complaint. Under Fed. R.Civ.P. 5(b), service by mail is complete upon mailing. However, the same is not true of papers filed by mail. *Wiss v. Weinberger*, 415 F.Supp.293 (E.D. Pa. 1976). In summary, Petitioner failed to file a timely amended complaint in violation of a court order.

The issues raised by the Petitioner involve matters which were within the sound discretion of the trial court. They do not involve issues which are of such import as to require review by the Supreme Court of the United States.

IV. To the Extent That Petitioner's Motion Is Considered a Motion to Alter or Amend a Judgment It was Not Timely Filed

Federal Rule of Civil Procedure 59(e) requires that a

motion to alter or amend a judgment be served within ten days after the entry of the judgment. The ten-day time period contained in this Rule is jurisdictional and cannot be extended in the discretion of the District Court. See *Glass v. Seaboard C.L.R. Co.*, 714 F.2d 1107 (11th Cir. 1983). In the case at bar, the judgment dismissing the case was entered on April 6, 1993 and Petitioner's motion was not served until April 17, 1993, beyond the ten-day deadline. This time limitation is to be strictly construed. *McConnell v. Medical & Ben. Plan*, 778 F.2d 521 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Lehigh County Department of Law
Henry S. Perkin
Lehigh County Courthouse
5th and Hamilton Streets
Allentown, PA 18101
(610) 820-3180

home at 2120 Latta Street. Initially, they checked the said of the home and when they did not discover anything, they then proceeded to the front door. The door was closed, but the officers could see inside the home by looking through the glass located on either side of the door. Cpl. Kish could see inside an area later determined to be the kitchen, and observed that a light was on as well as the television. Cpl. Kish then rang the doorbell, and after doing so observed an individual, later determined to be the defendant, come from the kitchen area to the front door. The door was opened and Cpl. Kish was confronted by the defendant, who was wearing a jacket, sun glasses, his hair appeared wet, and most importantly he was carrying a gun in his right hand. The gun was a .357 magnum, which was loaded with five "jacketed hollow-point bullets". Additionally, when Officer Rehrig opened the cylinder, he discovered that directly in line

with the barrel was a discharged cartridge.

When Cpl. Kish observed the gun, he immediately shined his flashlight in the defendant's eyes, yelled "gun" to Officer Rehrig, and drew his service weapon. The defendant was ordered to drop his weapon and when he complied, Cpl. Kish "advised him to turn and face the wall, drop to his knees, and put his hands behind his head and interlock his fingers". The defendant complied and the officers secured him. Cpl. Kish also patted him down and in his right front pants pocket discovered a set of metal knuckles.

When the defendant was secured, Cpl. Kish went through the home to look for victims or other persons. The reason for this action was the information which brought them to the home, which included shots and a woman screaming. His route included the kitchen area, where he observed on the kitchen table, in plain view, a jar with green vegetable

matter, and a Miller Light can rigged for the smoking of marijuana.

Cpl. Kish continued to search for victims in the basement, and in plain view observed broken television sets with what appeared to be bullet holes in each one.

Upon completion of his search for victims and upon the arrival of the defendant's parents, defendant was removed from the residence and taken to a patrol vehicle by officers of the South Whitehall Police Department. While the defendant was being taken to the patrol vehicle, he threatened the officers and stated "I'm going to kill all of you".

From 2120 Latta Street the defendant was taken back to police headquarters, and at 23:24 hours was given his Miranda warnings. The defendant acknowledged his rights, waived them, and agreed to speak with Cpl. Kish. During the interview, he told Cpl. Kish that he had been drinking all weekend, and that he

had had approximately two six packs of Miller Light prior to the officers arriving. Initially, he told Cpl. Kish that he had not been shooting his weapon. but later stated that he was shooting the gun at a pheasant in the back yard. He also stated that "he likes to stand at the top of the steps and shoot his .357 magnum at the bottom of the steps as he was watching championship wrestling".

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT GEORGE BURCHILL	:	CIVIL ACTION
	:	
v.	:	NO. 92-2776
	:	
DOUGLAS KISH, SCOTT R. REHRIG, MICHAEL HARBOVE, DONALD K. MacCONNELL, ARTHUR SPITKO, THOMAS TOTH, SOUTH WHITEHALL POLICE DEPARTMENT, SOUTH WHITEHALL TOWNSHIP, KELLY WALDRON, ROBERT L. STEINBERG, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, LEHIGH COUNTY, ALLENTOWN HOSPITAL/ HEALTHEAST, DR. PAUL GROSS, CLYDE R. BOWER, JOHN DOE and RICHARD ROE:	:	

ORDER

AND NOW, this 22nd day of February, 1993, plaintiff Robert George Burchill is apparently an attorney at law who has filed a Complaint on May 13, 1992 against fifteen defendants generally alleging causes of action under 42 U.S.C.A. Section 1981, 1982, 1983, 1985, and 1988, as well as under Amendments 4, 5, 6 and 14 of the United States Constitution. The causes of action all relate to plaintiff's arrest on May 13, 1990 and subsequent trial and mental health proceedings. We have before us a number of motions and responses which we dispose of as follows:

(1.) Defendant Allentown Hospital/ HealthEast, Inc.'s Motion to Dismiss filed September 30, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order. Defendant Allentown Hospital/ HealthEast, Inc.'s Motion to Strike

Plaintiff's Answer filed November 16, 1992 is **DENIED AS MOOT.**

(2.) Defendant Dr. Paul Gross's Motion to Dismiss filed October 5, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order. Defendant Dr. Paul Gross's Motion to Strike Plaintiff's Answer filed November 5, 1992 is **DENIED AS MOOT.**

(3.) Defendants Robert L. Steinberg and Kelly Waldron's Motion for Summary Judgment and to Dismiss filed October 21, 1992 is **GRANTED IN PART** and **DENIED IN PART.** The motion for summary judgment is **DENIED** without prejudice to said defendants' right to reassert it, if necessary, when discovery is complete. The motion to dismiss is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order.

(4.) Defendant Lehigh County's Motion to Dismiss filed December 3, 1992 is **GRANTED**

without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order.

(5.) Defendant Clyde R. Bower's Motion to Dismiss filed December 3, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over within twenty-one (21) days of the date of this Order.

(6.) Defendants Douglas Kish, Scott R. Rehrig, Michael Harbove, Donald K. MacConnell, Arthur Spitko, Thomas Toth, South Whitehall Police Department and South Whitehall Township's Motion to Dismiss filed December 28, 1992 is **GRANTED** without prejudice to plaintiff's right to plead over, if he can, within twenty-one (21) days of the date of this Order.

(7.) Plaintiff's Motion for Relief Pursuant to F.R.C.P. 56(f) filed January 25, 1993 is **DENIED AS MOOT.**

We expect and direct that plaintiff shall and will drop all causes of action

which are improper or which lack merit, and file a timely new proper pleading asserting any remaining causes of action within twenty-one (21) days of the date of this order. Any causes of action not reasserted in an Amended Complaint within twenty-one (21) days will be deemed dismissed with prejudice. The Amended Complaint shall be specific and shall make it clear, in separate counts, exactly what facts give rise to exactly what causes of action and exactly what defendants they are directed against. When necessary, plaintiff shall also explain why prior service was proper or timely. In this regard, we remind plaintiff of the numerous deficiencies alleged in the defendants' briefs and, in particular, we point out the following.

The general standard for pleading Section 1983 civil rights claims is a more stringent one. The requirement is that the complaint state facts upon which the court

can weigh the substantiality of the claim. Negrich v. Hohn, 379 F.2d 213, 215 (3rd Cir. 1967); Rotolo v. Burrough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976); and LePlant v. Frazier, 564 F.Supp. 1095 (E.D. Pa. 1983). Under the standard, a plaintiff must state the conduct violating his or her civil rights, when and where the conduct occurred, and who was responsible. A complaint will be dismissed if it contains only vague and conclusive allegations. Boykins v. Ambridge Area School District, 621 F.2d 75, 80 (3rd Cir. 1980); Hall v. Pennsylvania State Police, 570 F.2d 86, 89 (3rd Cir. 1978). This standard operates to eliminate frivolous claims, and to guard the reputations of public servants who are particularly susceptible to these claims. United States v. City of Philadelphia, 644 F.2d 187, 206 (3rd Cir. 1980).

If plaintiff's constitutional claims do have merit, they can be sufficiently

vindicated by an action under 42 U.S.C. Section 1983 and there is no need or right to asset a cause of action directly under the Constitution. Rogin v. Bensalem, 616 F.2d 680, 686-87 (3rd Cir. 1980); Mahone v. Waddle, 564 F.2d 1018, 1024 (3rd Cir. 1977); DiGiovanni v. City of Philadelphia, 481 F.Supp. 1053, 1055-56 (E.D. Pa. 1979); Kedra v. City of Philadelphia, 454 F.Supp. 652, 679 (E.D. Pa. 1978). We also fail to see at this point exactly how a direct cause of action arises under 42 U.S.C. Section 1981, 1982 and 1988 (beyond requesting counsel fees). We direct plaintiff to read these sections before pleading over. Defendants' assert that plaintiff is white and not of the class protected by Section 1981.

There is no respondeat superior liability in Section 1983 cases. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3rd Cir. 1976); Monell v. Dept. of Social Services, 436 U.S. 658, 691, 98 S.Ct.

2018, 2036, 56 L.Ed.2d 611 (1978). A complaint filed under 42 U.S.C.A. Section 1983 against a municipality or similar political subdivision must allege, (1) the existence of a custom or policy of the municipality which is of such long standing as to have force of law, and (2) that one or more than one of the municipality's employees violated the plaintiff's civil rights while acting pursuant to this custom or policy. See, Monell v. Dept. of Social Services, 436 U.S. 658, 691-94 (1978); DiGiovanni v. City of Philadelphia, 531 F.Supp. 141, 145 (E.D. Pa. 1982).

Additionally, the complaint must articulate a full factual basis sufficient to support the requisite allegations. See, LePlant v. Frazier, 564 F.Supp. 1095, 1098 (E.D. Pa. 1983), cited in Sambrick v. Borough of Norristown, 639 F.Supp. 1351 (E.D. Pa. 1986). Plaintiff must show an actual "affirmative link" between the occurrence of

police misconduct and the municipal policy or custom. Rizzo v. Goode, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 56 (1976). Plaintiff is required to plead these elements with particularity. Rotolo v. Burrough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976). Furthermore, the policy underlying the more stringent pleading requirement in Section 1983 claims is even more pronounced when a municipality is charged with a violation under the statute. There is a public interest in protecting local government's files from overbroad and irrelevant inquiries. United States v. City of Philadelphia, 644 F.2d 187, 206 (3rd Cir. 1980).

On a more specific note, we also point out that a prosecutor has an absolute immunity under 42 U.S.C. Section 1983 even if the prosecutor's "malicious or dishonest action[s] deprive[]" someone of liberty. Imbler v. Pachtman, 424 U.S. 409, 427, 96

S.Ct. 984, 993, 47 L.Ed.2d 128 (1976). Similarly, all witnesses in judicial proceedings are immune from liability under 42 U.S.C. Section 1983. Briscoe v. Lahue, 460 U.S. 325, 334, 345, 103 S.Ct. 1108, 1115, 1120, 75 L.Ed.2d 96 (1983). Furthermore, "nothing in the language or legislative history of Section 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court acting within its proper jurisdiction has given the parties a full and fair opportunity to litigate federal claims." Allen v. McCurry, 449 U.S. 90, 103, 101 S.Ct. 411, 419, 66 L.Ed.2d 308 (1980); Switlik v. Hardwicke Co., Inc., 651 F.2d 852, 859 (3rd Cir. 1981).

Lastly, we warn plaintiff, who is acting as his own lawyer, of the provisions of Fed.R.Civ.P. 11 which provides in relevant

part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ....

An attorney's signature certifies that the attorney has satisfied three duties: (1) that he has read the documents; (2) that he has made a reasonable inquiry; and (3) that he is not acting in bad faith. Each duty is independent; the violation of one triggers Rule 11 sanctions. See 5A Charles A. Wright & Arthur r. Miller, Federal Practice and Procedure Section 1335 (1990). We will not repeat this warning again, and will impose substantial monetary or other

sanctions for any causes of action in an Amended Complaint which are brought in bad faith.

BY THE COURT:

Franklin S. Van Antwerpen, U.S.D.J./s/

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT G. BURCHILL, Plaintiff	:	
	:	No. 92-CV-2776
v.	:	
	:	Civil Action - Law
DOUGLAS KISH, et al., Defendants	:	

ORDER

AND NOW, this 9th day of March, 1992, upon consideration of plaintiff's Motion to Enlarge Time, it is hereby ORDERED: plaintiff's motion is hereby **GRANTED**. Plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice. **NO FURTHER EXTENSIONS WILL**

BE PERMITTED.

BY THE COURT:

Honorable Franklin S.
Van Antwerpen J./s/

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT GEORGE BURCHILL	:	CIVIL ACTION
	:	
v.	:	
	:	
DOUGLAS KISH, SCOTT R. REHRIG, MICHAEL HARBOVE, DONALD K. MacCONNELL, ARTHUR SPITKO, THOMAS TOTH, SOUTH WHITEHALL POLICE DEPARTMENT, SOUTH WHITEHALL TOWNSHIP, KELLY WALDRON, ROBERT L. STEINBERG, LEHIGH COUNTY DISTRICT ATTY'S OFFICE, LEHIGH COUNTY, ALLENTOWN HOSPITAL/ HEALTHEAST, DR. PAUL GROSS, CLYDE R. BOWER, JOHN DOE and RICHARD ROE	:	NO. 92-2776

ORDER

AND NOW, this 5th day of April, 1993, the Court having previously dismissed all defendants by an annotated Order of February 22, 1993 with a notation that "any causes of

action not reasserted in an Amended Complaint within twenty-one (21) days will be deemed dismissed with prejudice," and the Court having issued an Order on March 9, 1993 granting plaintiff's motion to enlarge time, which Order granted an additional twenty-one (21) day period of time from march 9, 1993 for the filing of an Amended Complaint with the express notation that "plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice," and it appearing that no such Amended Complaint has been filed, **NOW THEREFORE**, the dismissals of February 23, 1993 are hereby deemed to be with prejudice and this case is **DISMISSED WITH PREJUDICE AS TO ALL DEFENDANTS AND CLOSED.**

BY THE COURT:

Franklin S. Van Antwerpen,
U.S.D.J./s/